Petition

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81-280
No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN G. KESTER
JOHN J. BUCKLEY, JR.
Hill Building
Washington, D.C. 20006
Attorneys for Petitioner

Of Counsel:
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Does § 1 of the Civil Rights Act of 1866, as reenacted in 1870, 42 U.S.C. § 1981, impose liability without proof of intent, or even knowledge, for racial discrimination committed by others?

2. May a nonemployer, which as agent for employers negotiated a lawful, nondiscriminatory collective bargaining agreement, be held vicariously "injunctively liable" under 42 U.S.C. § 1981 for a union's subsequent racial discrimination that violated that agreement—when the court found that the nonemployer did not intend, did not know of, and did not have reason to know of that discrimination?

3. In such circumstances, may the nonemployer be ordered to pay 10% of the expenses of a court-ordered program to remedy the union's discrimination?*

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* If the Court grants certiorari, Petitioner would also brief the additional question whether the Commonwealth of Pennsylvania had standing to sue under § 1981 on a theory of *parens patriae*.

Parties to the proceeding in the court of appeals are:

Commonwealth of Pennsylvania;

Raymond Williams, Willie McKay, Marion J. Eaddy, Randolph Hughes, Jr., Ariel Brownlee, William Bostic, Kenneth Howard, Alpha Christmas, Ronald Richardson, Clarence Winder, Ronald Crawford, Frank Gilchrist, and all others similarly situated;

Local Union 542, International Union of Operating Engineers;

Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania and the State of Delaware (JATC);

General Building Contractors Association, Inc., Contractors Association of Eastern Pennsylvania, United Contractors Association, and all others similarly situated;

Glasgow, Inc., and all others similarly situated;

United Engineers & Constructors, Inc.;

Bechtel Power Corporation.

Pursuant to Rule 28.1, Petitioner states that it is a nonprofit corporation with no parent companies or subsidiaries; it is affiliated with the Associated General Contractors of America.

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v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on May 19, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, sitting *en banc*, stated simply that the judgment of the District Court was affirmed by an equally divided court. That opinion is bound with this Petition as Addendum 1, and is reported at 648 F.2d 923.

The bulk of the principal opinion of the United States District Court for the Eastern District of Pennsylvania deals with factual issues of the union's discrimination, and not with the purely legal issue of trade-association liability presented by this Petition. The portions of that court's opinions that are pertinent to this Petition are

bound herewith as Addendum 2; the opinions and judgment are reproduced in full in the separate Appendix and are reported at 469 F. Supp. 329, 488 F. Supp. 988, 502 F. Supp. 7, and 507 F. Supp. 1146.

JURISDICTION

The judgment of the Court of Appeals was entered May 19, 1981. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Revised Stat. § 1977, 42 U.S.C. § 1981, provides as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

STATEMENT

The issue in this case is whether 42 U.S.C. § 1981 authorizes imposing liability without proof of the defendant's discriminatory intent, and indeed even without proof of knowledge of discrimination.

The action was brought by twelve black plaintiffs as representatives of a class of blacks seeking operating engineer jobs and by the Commonwealth of Pennsylvania suing as *parens patriae*. They claimed that Local 542, a union of operating engineers in the Philadelphia area, and the JATC, the local apprenticeship training committee, had violated a hiring hall agreement and had discriminated against black applicants for operating engineer jobs. The complaint under 28 U.S.C. §§ 1343

and 1331 alleged violations of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000(e), of § 1 of the Civil Rights Act of 1866, as reenacted, 42 U.S.C. § 1981, and of other statutes. (A. 4a, 10a n.43.)[1] Also joined as a defendant was one employer (later certified as representative of a sub-class of 1,400 employers in the area). (A. 3a-4a.)

Finally, also named as defendants were four (later three) trade associations—including Petitioner, General Building Contractors Association, Inc.—which were certified as representatives of a separate defendant subclass of associations. (A. 3a, 5a.) Petitioner is a nonprofit corporation which has represented about 80 of the 1,400 contractors. Petitioner has never employed an operating engineer. Petitioner is not engaged in the construction business. Petitioner functions simply as a trade association, conducts educational programs, and in 1961 acted as agent for about 80 of the employers to negotiate and sign a collective bargaining agreement with Local 542. That agreement established a hiring hall and established procedures which, the district court found, were legal in terms both of federal labor law and federal antidiscrimination law. (A. 8a.) Petitioner did not administer or have control of the hiring hall in any way. (A. 7a.)[2]

The trial court found that "the hiring hall system is on its face neutral and purports to create a bona fide seniority system. Plaintiffs' allegations of discrimination are not directed against the hiring hall system per se but against the union's alleged intentional refusal to follow their own hiring hall rules." (A. 8a.) The court went on to find that the union intentionally had violated both Title VII and § 1981, in what the

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[1] References cited as "A." refer to pages of the Addenda bound with this petition.

[2] Although this case was set in Philadelphia, the decision concerns a claim of hiring-hall discrimination and not the federal government's "Philadelphia Plan."

court termed "a motley fabric of arbitrary departures from the rules" of the hiring hall agreement. (A. 8a, 13a.) The court also found that the JATC apprenticeship committee had intentionally violated § 1981. (A. 13a n.52.) [3]

With respect to Petitioner and the other associations, however, the district court's findings were entirely different.

As to them it found no Title VII violation.

It further held that, as to them, there had been a failure of proof of intentional discrimination, or even knowledge or notice of it:

> "*I find that the plaintiffs have failed to prove on a preponderance of the evidence that the associations* [including Petitioner] *or contractors viewed simply as a class were actually aware of the union discrimination* affecting the employment of minority persons throughout the operating engineer industry in Local 542's jurisdiction. Such knowledge with actual participation in the hiring hall system would itself constitute intentional discrimination. *I also find that not all contractors and associations may be said as a class to have had reasonable notice of the union's discrimination* in view of the great number of contractors and the varying size and intensity of their work." (A. 14a.) (Emphasis in part supplied.)

The court reiterated that "plaintiffs have failed to show an intent to discriminate by the employers [or associations] as a class, and indeed have been unable to show knowledge or notice of discrimination by that class as a whole." (A. 29a.)

But the court did not stop there. It went on to rule that "although plaintiffs have frequently characterized

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[3] The district court found that the plaintiffs had failed to prove their claims of conspiracy under 42 U.S.C. § 1985(3). (A. 29a.) It did not decide whether other statutes they cited, which do not pertain to Petitioner, had been violated. (A. 10a n.43.)

their action as being based on intentional discrimination they are not limited to this standard . . . ." (A. 4a.) It then held Petitioner "vicariously" liable (A. 13a, 15a) for injunctive relief *under 42 U.S.C. § 1981*:

> "*Nevertheless, I find that the contractors and associations* [including Petitioner] *are injunctively liable to the plaintiff class under § 1981* as a result of their contractual relationship to and use of a hiring hall system which in practice effectuated intentional discrimination, *whether or not the employers and associations knew or should have known.*" (A. 14a.) (Emphasis supplied.) [4]

The court added that Petitioner had a "duty to see that no discrimination takes place *outside* the agreement." (A. 20a.) (Emphasis supplied.) As the district court summarized the holding,

> "In the instant case, *the finding of liability was that the contractors' associations* and the contractor-employers *were not aware of the discriminatory entrance and referral practices* of the Local's hiring hall, *or even that they should have been aware of such discriminatory acts.*" (A. 31a.) (Emphasis supplied.)

It conceded that "no case has been found which imposes civil rights liability on the employer or association in these precise circumstances." (A. 14a.)

For the proposition that § 1981 could be used to impose liability on one who had not committed intentional discrimination, the court relied on "the leading case holding that a § 1981 claim requires only proof of discriminatory impact . . . *Davis* v. *County of Los Angeles*,

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[4] Elsewhere the court recognized that Petitioner had no contractual relationship with the hiring hall system other than having signed the valid collective bargaining agreement as agent for some of the contractors, and that Petitioner as a nonemployer obviously does not "use" the hiring hall system. (A. 7a.)

566 F.2d 1334 (9th Cir. 1977), *cert. granted*, 437 U.S. 903 . . . (1978)." (A. 11a.)[5] The court concluded that:

> "I therefore adopt the view that a § 1981 employment discrimination claim may be proven on roughly the same basis as a Title VII claim . . . . In this view I agree with the majority in *Davis v. County of Los Angeles* . . . ." (A. 13a.)

A judgment and decree issued, which mandated extensive five-year relief including hiring quotas and a job notification and training program. Because Petitioner was neither an employer nor a participant in the hiring hall, Petitioner was not ordered to hire anyone and was not ordered to cease any present or past activity; however, it was ordered by the district court to pay 10% of the expenses of the ongoing remedial program mandated by the decree. (A. 30a n.5.) To date the expenses of that program as approved by the district court are in excess of $200,000. The program is scheduled to run until 1985.

On appeal, the Third Circuit after argument before a panel set the case *sua sponte* for reargument *en banc*. The full bench of the court of appeals:

> —unanimously affirmed, 648 F.2d 922, that portion of the judgment that held the evidence showed that the union and the apprenticeship committee had intentionally discriminated;
>
> —separately affirmed, 648 F.2d 923, that portion of the judgment that held that as a matter of law Petitioner, the other associations, and the employer class could be held liable even though they had not discriminated themselves nor had knowledge or reason to know of discrimination. This affirmance, by contrast, was by an equally divided court. (A. 2a.)

It is only the latter affirmance, and the purely legal issue pertaining to it, that is involved in this Petition.

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[5] The district court stated that

> "An argument does exist . . . that *Washington* [v. *Davis*, 426 U.S. 229 (1976)] may have foreclosed the issue, requiring that discriminatory motive be proven as a prerequisite to § 1981 relief. However, the Ninth Circuit in *Davis v. County of Los Angeles* distinguished *Washington* . . . ." (A. 12a.)

REASONS FOR GRANTING THE WRIT

This case presents the issue which this Court granted certiorari to decide, but did not decide, in *County of Los Angeles* v. *Davis*, 440 U.S. 625 (1979).

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THE SECOND, FIFTH, SEVENTH, EIGHTH, NINTH AND TENTH CIRCUITS.

Although this litigation has gone on for a long time, the issue of law presented to this Court is crystal-clear and simple: Does the Civil Rights Act of 1866, as reenacted, 42 U.S.C. § 1981, authorize holding a bystander liable for the racial discrimination of another—where the bystander (as the district court found)

—did not discriminate

—did not *intend* to discriminate

—did not *know* of the discrimination

—did not *have reason to know* of the discrimination?

Specifically, on the facts found in this case (which no party in this Court challenges), may a trade association which as the court found *did nothing more than as agent negotiate a concededly valid, nondiscriminatory collective bargaining agreement*, and had no further involvement, be held "vicariously" liable for subsequent discrimination by a union that violated the terms of that agreement?

A. Intent Under § 1981

This Court has had before it on one earlier occasion the question, so far left open by this Court, whether § 1981 permits a defendant to be held liable for racial discrimination absent a finding that the defendant intended to discriminate. In *County of Los Angeles* v. *Davis*, *supra*, this Court granted certiorari to review that very question. See 440 U.S. at 627. Subsequent events caused that case to be vacated as moot. The

issue has not since been addressed directly by this Court. That issue is starkly and simply presented here by the lower court's holding that § 1981 imposes liability on one who it found did not intentionally discriminate.

Indeed, that court—in what it conceded was a holding without precedent—went even further. It held not only that § 1981 permits a defendant to be held liable without regard to intent, but also that there need be no showing (it found there had been none here) that the defendant even knew—or even had reason to know—that any racial discrimination was going on. In other words, Petitioner here, solely because it acted as agent of some employers (who the court found also did not know of discrimination), to negotiate a *nondiscriminatory* hiring hall agreement,[6] is held liable for subsequent discrimination by the union, in violation of that agreement, which Petitioner was unaware of, and had no reason to be aware of. Petitioner, a trade association, is converted by the court under authority of § 1981 into a strictly-liable insurer against the union's discrimination. Indeed, the plaintiffs have not hesitated to state that their theory for holding Petitioner liable under § 1981 "is one of strict liability."[7]

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[6] The record shows that the employers and associations opposed the hiring-hall provision until the union forced them to agree to it after two lengthy strikes. (A. 6a.)

[7] Transcript of oral argument, U.S. Court of Appeals, Third Circuit, at 78; see also *id.* at 74. As counsel for the plaintiffs emphasized to the court of appeals:

> "THE COURT: I take it you would not make any distinction then between the situation where the employers knew about discrimination and the employers did not know?
>
> "MR. GOODMAN [Counsel for Plaintiffs]: Yes, sir, I would not.
>
> "THE COURT: That's an absolute liability?
>
> "MR. GOODMAN: Absolutely. And that is precisely our position." *Id.* at 67-68.

And Petitioner, of course, is not even an employer.

The Third Circuit's affirmance of the district court's novel holding is in direct conflict with holdings of six other circuits and dicta in two others. That there can be no liability under § 1981, injunctive or otherwise, without proof of the defendant's intent to discriminate has been held in *Guardians Ass'n* v. *Civil Service Comm'n*, 633 F.2d 232 (2d Cir. 1980); *Williams* v. *De Kalb County*, 582 F.2d 2 (5th Cir. 1978); *Grigsby* v. *North Mississippi Medical Center, Inc.*, 586 F.2d 457 (5th Cir. 1978); *City of Milwaukee* v. *Saxbe*, 546 F.2d 693 (7th Cir. 1976); *Mescall* v. *Burrus*, 603 F.2d 1266 (7th Cir. 1979); *Johnson* v. *Alexander*, 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978); *Donnell* v. *General Motors Corp.*, 576 F.2d 1291 (8th Cir. 1978); *Craig* v. *County of Los Angeles*, 626 F.2d 659 (9th Cir. 1980), *cert. denied*, 101 S.Ct. 1364 (1981); and *Chicano Police Officer's Ass'n* v. *Stover*, 552 F.2d 918 (10th Cir. 1977).[8] In addition, although not required to rule directly on the question, two other courts of appeals have endorsed the view that discriminatory intent must be established under § 1981. *Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 49 U.S.L. Week 3931 (1981); *Des Vergnes* v. *Seekonk Water Dist.*, 601 F.2d 9 (1st Cir. 1979).

The reasoning of these cases is typified by that of the Ninth Circuit in repudiating that circuit's earlier reasoning in *County of Los Angeles* v. *Davis*:

> "Plaintiffs conceded that they cannot prove intentional discrimination but argue that employment discrimination claims under § 1981, like Title VII claims, do not require such proof. That is not the law.
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> • • • •

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[8] The Tenth Circuit reached its conclusion in *Chicano Police Officer's Ass'n* after this Court remanded the case "for further consideration in light of *Washington* v. *Davis*." *Stover* v. *Chicano Police Officers Ass'n*, 426 U.S. 944 (1976).

> "[T]he historical connection between § 1981 and the Fourteenth Amendment, the thrust of the Supreme Court decision in *Washington* v. *Davis*, *supra*, the complexity as well as legislative history of the statutory scheme adopted by Congress in Title VII, and the ease with which acceptance of plaintiffs' theory would allow circumvention of that scheme convince us that equal protection rather than Title VII standards apply to employment discrimination claims brought under § 1981. Thus, we affirm that part of the judgment denying relief under § 1981." *Craig* v. *County of Los Angeles*, *supra*, 626 F.2d at 668 (footnote omitted).

Until the Third Circuit ruled against Petitioner in this case, no court of appeals after *Washington* v. *Davis*, 426 U.S. 229 (1976), had held that § 1981 imposed liability without intent to discriminate except for the vacated Ninth Circuit holding, 566 F.2d 1334 (1977), in *Davis v. County of Los Angeles*, *supra*.[9] The holding below is also supported by a dictum in *Kinsey* v. *First Regional Securities, Inc.*, 557 F.2d 830, 838 n.22 (D.C. Cir. 1977). The Fourth Circuit has stated that in that circuit "the question is open." *United Black Firefighters* v. *Hirst*, 604 F.2d 844, 848 (4th Cir. 1979).

B. Vicarious Liability

No court ever has held, as the court did here, that § 1981 not only does not require intent, but goes even further and imposes on a non-employing trade association an absolute duty to guarantee that an employer's workforce will not be affected by the discriminatory acts of others. Yet the lower court here discovered in § 1981 a "duty to see that no discrimination takes place *outside*

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[9] As noted, the Ninth Circuit itself later adopted the opposite view in *Craig* v. *County of Los Angeles*, *supra*. There have been a few district court cases holding that § 1981 does not require intent, some of them overruled by subsequent court of appeals decisions in their respective circuits. See, *e.g.*, *Movement for Opportunity* v. *Detroit Diesel*, 18 F.E.P. Cas. 557 (S.D. Ind. 1978).

the agreement," (A. 20a) (emphasis supplied), and applied this novel duty to Petitioner simply because Petitioner had negotiated and as bargaining agent signed the nondiscriminatory agreement. At the same time, it admitted that it could find no precedent for its holding. (A. 14a.)

The opinion turned for analogies to several groups of cases, all of them unlike the present one, and none involving § 1981 or that statute's liability standard. (A. 15a-17a.) First were NLRB cases holding a union liable for discrimination in the hiring hall; each of those, however, involved an employer, ~ ~ a trade association, and in each the employer knew or should have known of the discrimination. (A. 15a-17a.) Second were Title VII cases involving the very different (discriminatory impact) standard of Title VII and the liability of parties to collective bargaining agreements that were themselves discriminatory. (A. 17a-21a.) Finally, the court cited as analogy the doctrine of *respondeat superior* (A. 21a-29a); but that has it backwards, because Petitioner here was not a master or principal of the union, did not control the hiring hall, and in negotiating the valid agreement was simply an agent of about 80 employers. No agency doctrine makes an agent responsible for acts of its principal; moreover, Petitioner's principals in the negotiation of the agreement, the 80 contractors, were likewise not found to have discriminated nor to have known nor to have had reason to know of the union's discrimination.

Apart from the total absence of any support in the legislative history of § 1981, the Third Circuit's judgment is irrational:

—It would make Petitioner liable for discrimination in the workforces of 1,400 employers, not just the 80 or so represented by Petitioner (and whom, moreover, Petitioner does not control).[10]

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[10] The district court found that "a vast majority of the employers are not and have not been active members of the defendant associations." (A. 7a, 6a.)

—It would impose liability on Petitioner without fault, and without knowledge, creating a novel duty to insure against discrimination in a situation over which the insurer has no control. (In the few special situations in which the law imposes strict liability, the party held strictly liable normally is in a position to remedy or insure against the defect.)

—It would hold Petitioner liable—simply because Petitioner negotiated an agreement—for discrimination by *another party* that subsequently occurred *in violation of* that agreement.

—It would hold Petitioner liable even though Petitioner is not in the construction business and does not employ any engineers at all.

—It would make unnecessary much of Title VII of the 1964 Civil Rights Act,[11] which does provide for relief in some cases without proof of discriminatory intent, but only after compliance with a carefully structured administrative process and with opportunity to present evidence on many relevant factors.[12] It ignores this Court's caution that "the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress

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[11] In *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 584 n.24 (1979), this Court noted that "Although the exact applicability of that provision [§ 1981] has not been decided by this Court, it seems clear that it affords no greater substantive protection than Title VII."

[12] In *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975), this Court pointed out that

> "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct and independent."

And in *Great American Fed. Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979), this Court observed that

> "Under Title VII, cases of alleged employment discrimination are subject to a detailed administrative and judicial process

has decided not to adopt." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 101 S.Ct. 1571, 1583 (1981).

C. Money Judgment Against Nonwrongdoer

Finally, the relief ordered against Petitioner was unsupportable. Although not finding wrongdoing by Petitioner, and imposing on Petitioner no substantive duties in the injunction, the court nevertheless ordered Petitioner to pay 10% of the expenses of the court's mandated remedial training and hiring program. So far the expenses of that program, which has several more years to run, exceed $200,000. In practical effect, Petitioner is being required to pay damages for the union's wrongs, and is also being unfairly treated as if it had discriminated. There is no basis in equity law for such liability, for "as with any equity case, the nature of the violation determines the scope of the remedy." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *accord*, *Milliken* v. *Bradley*, 418 U.S. 717 (1974). In ordering a non-wrongdoer to pay for correcting the wrongdoing of another, the decision below is in conflict with *City Bank* v. *Rivera Davila*, 438 F.2d 1367, 1371 (1st Cir. 1971), and *Rios* v. *Enterprise Ass'n Steamfitters*, 400 F. Supp. 993 (S.D.N.Y. 1975), *aff'd sub nom. EEOC* v. *Enterprise Ass'n Steamfitters*, 542 F.2d 579 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977).

To allow the Third Circuit's anomalous judgment to stand would mean that the Congress in 1866 and 1870 imposed on any persons having any connection with a collective bargaining agreement an absolute duty, not

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designed to provide an opportunity for nonjudicial and non-adversary resolution of claims. . . .

* * *

If a violation of Title VII could be asserted through § 1985(c), a complainant could avoid most if not all of these detailed and specific provisions of the law." 442 U.S. at 373, 375-76.

just to avoid discrimination themselves, even unintentional, but to prevent others from engaging in discrimination, even discrimination of which they have no knowledge and over which they have no control. Such an interpretation is contrary to that in *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 212 (1979), in which this Court in construing § 301 of the Taft-Hartley Act, 61 Stat. 156, 29 U.S.C. § 185, rejected the claim that an international union could be held responsible for an illegal strike by a local which the international did not control. And this Court has noted that even when there is a right to control (as here there was not),

> "By our decision in *Rizzo* v. *Goode*, 423 U.S. 362 (1976), we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability. See 423 U.S., at 370-371." *Monell* v. *Department of Social Services*, 436 U.S. 658, 694 n.58 (1978).

There is nothing in the case law or the legislative history to justify the lower court's contorted gloss on § 1981, and for that reason the law in the Third Circuit [13] should be brought back into line with that of the rest of the country.

II. THE DECISION BELOW IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

In *Washington* v. *Davis*, 426 U.S. 229 (1976), this Court held that "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights* v.

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[13] And apparently the D.C. Circuit. See *Kinsey* v. *First Regional Securities, Inc., supra; Winston* v. *Smithsonian Science Information Exchange, Inc.*, 437 F. Supp. 456, 473 (D.D.C. 1977) (dictum), *aff'd without opinion*, 595 F.2d 888 (D.C. Cir. 1979).

Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977).

> "[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection clause of the Fourteenth Amendment."

City of Mobile v. *Bolden*, 446 U.S. 55, 66 (1980) (opinion announcing judgment); see also *id.* at 80 (Blackmun, J., concurring); *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 260, 272 (1979).

That the decision below is in conflict with the clear import of *Washington* v. *Davis* has been recognized in opinions of several other courts of appeals. *See, e.g., Craig* v. *County of Los Angeles, supra.* As the Second Circuit commented, "in *Washington* v. *Davis*, the Supreme Court subsequently pulled the legal rug out from under" cases holding that § 1981 did not require proof of discriminatory intent. *Guardians Ass'n* v. *Civil Service Comm'n, supra*, 633 F.2d at 264. Reconsidering on remand from this Court its earlier position that § 1981 did not require proof of discriminatory intent, the Tenth Circuit said that after *Washington* v. *Davis* "the error in our holding and the views expressed by us is clear." *Chicano Police Officer's Ass'n* v. *Stover, supra*, 552 F.2d at 920.

This Court has required proof of discriminatory intent in applying other post-Civil-War legislation. Title 42 U.S.C. § 1982 was enacted and reenacted as a companion to § 1981, and this Court has said that §§ 1981 and 1982 should be construed together because of their common origin. *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973). Applying § 1982 in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), this Court concluded "that § 1 [of the 1866 Civil Rights Act] was meant to prohibit *all racially motivated* deprivations of the rights enumerated in the statute." 392 U.S. at 426 (emphasis in part supplied).[14] Later following the reason-

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[14] In *City of Memphis* v. *Greene*, 101 S.Ct. 1584 (1981), the question was specifically presented, but was not decided, whether a violation of 42 U.S.C. § 1982 could be established without proof of discriminatory intent. See *id.* at 1601 (White, J., concurring).

ing of *Jones* to apply § 1981 as well to private discrimination, this Court again did so in the context where a deliberate action—refusal to extend equal opportunities to blacks because of their race—was shown. *Runyon* v. *McCrary*, 427 U.S. 160 (1976). *Cf.* also *City of Mobile* v. *Bolden*, *supra* (Fifteenth Amendment claim requires proof of discriminatory purpose); *Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979) (§ 1983 claim requires proof of discriminatory purpose); *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971) (§ 1985(3) claim requires proof of discriminatory purpose).[15] None of the post-Civil-War statutes has been interpreted to apply to unintentional discrimination.

Moreover, this Court has held that § 1 of the 1866 Civil Rights Act rejected the notion of "vicarious liability" for discrimination by others in the context of municipal liability. *Monell* v. *Department of Social Services*, *supra*, 692 n.57 (1978). The notion of "vicarious" strict liability should not be lightly imported into post-Civil-War legislation.

The decision below is impossible to square with the clear implication of *Washington* v. *Davis*, nor with the rejections of vicarious liability in *Monell* and *Carbon Fuel*. Indeed, it would set this Court's holding in *Washington* v. *Davis* at naught, because in any state-action discrimination case the plaintiff could avoid the requirement of proving discriminatory intent under the constitutional standard by the simple expedient of adding a claim under § 1981.

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[15] This Court in *Griffin* noted that

> "The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment." 403 U.S. at 102.

III. WHETHER § 1981 CAN BE USED TO IMPOSE LIABILITY WITHOUT PROOF OF INTENT OR KNOWLEDGE IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The importance of the question whether § 1981 requires proof of intent was recognized by this Court's grant of certiorari in *County of Los Angeles* v. *Davis*, *supra*, "to consider questions presented as to whether the use of arbitrary employment criteria, racially exclusionary in operation, but not purposefully discriminatory, violates 42 U.S.C. § 1981 . . . ." 440 U.S. at 627. Dissenting from the holding of mootness in that case, Mr. Justice Powell joined by the Chief Justice urged that

> "We should reach . . . the important question—heretofore unresolved by this Court—whether cases brought under 42 U.S.C. § 1981, like those brought directly under the Fourteenth Amendment, require proof of racially discriminatory intent or purpose." 440 U.S. at 637.

The various courts of appeals, most of which have decided this issue contrary to the way the Third Circuit did here, have termed it an "as yet unsettled question," *Guardians Ass'n* v. *Civil Service Comm'n*, *supra*, 633 F.2d at 263, or an "open" question, *United Black Firefighters* v. *Hirst*, *supra*, 604 F.2d at 848. It is clear that they await an authoritative determination by this Court. Indeed, one court of appeals has written that

> "Guidance from the Supreme Court regarding the correct interpretation of § 1981 has been eagerly awaited ever since *Washington* v. *Davis* . . . ." *Guardians Ass'n* v. *Civil Service Comm'n*, *supra*, 633 F.2d at 264 n.61.

The public importance of this issue also was noted in the memorandum filed on behalf of the United States in *County of Los Angeles* v. *Davis*, *supra*, which though arguing that that case was not a suitable vehicle to consider them, called these "far reaching questions that may govern much other litigation. Presumably, the issues will come before the Court in a proper case in due course." Memorandum for the United States and the EEOC as Amicus Curiae, No. 77-1553, October Term, 1978, at 20.

The questions remain far-reaching, and undecided by this Court. They will continue to govern other litigation. The present case is the proper one in which to resolve them.

CONCLUSION

For the reasons stated, the petition should be granted.

Respectfully submitted,

JOHN G. KESTER
JOHN J. BUCKLEY, JR.
Hill Building
Washington, D.C. 20006
Attorneys for Petitioner

Of Counsel:

WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

August, 1981.

ADDENDA

1. Opinion of the Court of Appeals
2. Opinions of the District Court, November 30, 1978 and December 23, 1980 (excerpted).

ADDENDUM 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2073/74 & 80-2161/62/63

COMMONWEALTH OF PENNSYLVANIA [*et al.*]

v.

LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS; [*et al.*]

[Balance of caption omitted in printing]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 71-2698)

Argued February 24, 1981

Before: WEIS and GARTH, *Circuit Judges* and MILLER, *Judge, Court of Customs and Patent Appeals* *

Reargued May 12, 1981 In Banc

Before: SEITZ, *Chief Judge*,
ALDISERT, GIBBONS, HUNTER, WEIS, and GARTH,
Circuit Judges

(Filed May 19, 1981)

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* The Honorable Jack R. Miller, United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

OPINION OF THE COURT

PER CURIAM:

To the extent that the judgment of the district court is challenged by these appeals, it is affirmed by an equally divided court.

ADDENDUM 2

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA [*et al.*]

v.

LOCAL UNION 542 [*et al.*]

No. 71-2698

November 30, 1978

OPINION

HIGGINBOTHAM, A. L., *C. J.**

I. INTRODUCTION

This employment discrimination suit was instituted in 1971 by twelve black plaintiffs on behalf of a class of minority workers involved in or desiring admittance to the operating engineer trade in Eastern Pennsylvania and Delaware. Also a named plaintiff is the Commonwealth of Pennsylvania, suing on behalf of its citizens and the above-described class. Defendants in this action are as follows: Local 542 of the International Union of Operating Engineers; a class assertedly represented by Glasgow, Inc., consisting potentially of more than 1400 construction contractors and employers receiving referrals through Local 542's exclusive hiring hall; four construction trade associations which represent the employers in contract negotiations;[1] and the Joint Apprentice-

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* United States Circuit Judge sitting by designation.

[1] Those trade associations are: Contractors Association of Eastern Pennsylvania; General Building Contractors Association, Inc; Pennsylvania Excavating Contractors Association; and United Contractors Association.

ship Training Committee ("JATC"), an organization created by Local 542 and the trade associations for the induction of new operating engineers. This opinion constitutes the findings of fact and conclusions of law relevant to the liability stage of the trial of this massive and intricate case.

The active claims of plaintiffs' class include a Title VII, 42 U.S.C. § 2000e et seq., employment discrimination claim against all defendants based upon alleged discrimination in the membership practices of 542, the operation of its referral system, and the hours and wages of minority operating engineers. The foundation of this claim also serves as the basis for a 42 U.S.C. § 1981 claim and a conspiracy claim under 42 U.S.C. § 1985(3) against all defendants, an unfair representation claim under 29 U.S.C. 158 against Local 542, and a Title VI discrimination claim against all those of the defendants who have deprived minority individuals of the benefits of federally funded construction projects. Local 542's function as an exclusive hiring hall in its geographical jurisdiction is at the center of each of the above claims; however, plaintiff asserts that the contractors and associations, having agreed to such a system in 1961 or thereafter, are co-participants with the union and cannot be absolved from liability for discrimination in the operation of the hiring hall. Although plaintiffs have frequently characterized their action as being based on intentional discrimination they are not limited to this standard particularly in view of the broad allegations in the complaint. I must therefore consider plaintiffs' factual claims in light of the full range of potential liability under the civil rights statutes involved.

* * * *

Other threshold issues before me now are plaintiffs' request for recertification of the defendant class so as to comport with the applicable statutes of limitations, and

the request of non-parties for decertification of the defendant class of contractors. As originally certified on March 13, 1972, that defendant class now consists of:

(a) all contractor associations which are, or may be, parties to a collective bargaining agreement with Local 542, International Union of Operating Engineers; and

(b) all contractor-employers who are subject to collective bargaining agreements with Local 542, International Union of Operating Engineers, and who, pursuant to such agreements, employ or will employ operating engineers referred to them by defendant Local 542.

* * * *

For the reasons expressed below I hold that this action is maintainable as both a plaintiff and defendant class action, given the modifications as will be set forth. Furthermore, we find the defendant 542, JATC, and the defendant class and associations liable injunctively.

The issue of individual monetary recovery as well as the possible issue of class composition for purposes of damage relief should not now be decided but must await Stage II of this litigation in accordance with this court's bifurcation order. The issue of damages, if any, owed to the plaintiffs who initiated this suit or to any members of the purported class involves a separate evidentiary inquiry and a further legal analysis which would not be appropriate at this stage. The case was purposely bifurcated with all parties recognizing that in a variety of ways, upon a determination of liability, the discovery and trial of the damage issues could be expedited. It would be unnecessarily costly to have expanded and made this litigation even more protracted by considering the damage issues prior to the time

when the correctness of my present findings and judgment on the liability issues have been fully subjected to final appellate review. . . .

* * * *

In 1961 Local 542 concluded a bargaining agreement with the defendants Contractors Association of Eastern Pennsylvania ("CAEP") and General Building Contractors Association ("GBCA") according to which 542 became the exclusive mechanism through which operating engineers were to be employed. Another association, the Delaware Construction Association, had agreed to the exclusive hiring hall earlier in 1961. Prior to 1961 the negotiating trade association had resisted efforts to establish an exclusive hiring hall. Given the reality of a ten week strike by 542 members and the prospect of serious adverse economic consequences from a continuing strike, the CAEP and GBCA agreed to the union's proposal.[3]

The hiring hall referral system thus formulated on paper is essentially the same one as is now embodied in the collective bargaining agreement. (I am not suggesting that the hiring hall in fact operated as it was supposed to or that hiring classifications were uniformly honored.) * * *

* * * *

The estimated 1400 contractors who have recently engaged in operating engineering work within Local 542's wide range may vary considerably in size. Relatively few are members of the defendant associations.

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[3] This agreement was negotiated by the CAEP and GBCA on behalf of its members. Not all employers were members; however, the defendant class is limited to all employers who have adhered to the agreement.

CAEP's active members numbered only 109 during the period 1965-1971, 88 during 1972-73, and 83 during 1974-75. Defendant GBCA listed its active membership at 104 for the 1965-1971 period, 99 for 1972-73, and 83 and 74 for 1974 and 1975, respectively. Defendant United Contractors Association ("UCA") had 28 active members at the time suit was filed in 1972, and between 1972-75 lost half of that membership. The remaining defendant association, Pennsylvania Excavating Contractors Association ("PECA"), dissolved in 1972; the record is silent as to its membership. Notably, both UCA and PECA have consistently delegated their negotiating responsibility to CAEP.

As a result of contracts entered into pursuant to negotiations with CAEP and GBCA in 1961 and subsequent negotiations with contractor associations, all participating contractors have passed on the direct managerial control of their application process to the hiring hall operated by Local 542. The contractors did not, however, relinquish power to affect the union's operation of the hiring hall, for the contract terms remained fully capable of enforcement in the event they were violated by those operating the hiring hall and the contract instituted a grievance procedure by which an appellate tribunal consisting of an "Employer Representative, a Union Representative and an Impartial Chairman appointed jointly by the Employer and Union . . ." would decide whether a complaining job applicant was aggrieved "with respect to the functioning of [the] hiring agreement." Article II, § 2(m). Although a vast majority of the employers are not and have not been active members of the defendant associations, the negotiations conducted by those bodies have established a standard to which the unaffiliated contractors may conform.

The hiring hall system is on its face neutral and purports to create a bona fide seniority system. Plaintiffs' allegations of discrimination are not directed against the hiring hall system per se but against the union's alleged intentional refusal to follow their own hiring hall rules, thus causing intentional discrimination against and a discriminatory adverse impact on minorities. Plaintiffs also allege discrimination particularly in admission into the union and admission to the job referral process. This allegation, although not attacking the hiring hall procedures set forth in the contract, does attack practices which would render the use of the hiring hall intentionally and otherwise discriminatory and contradict its bona fide seniority appearance. The foundation of this case rests on the statistical, documentary and testimonial evidence of discriminatory departures from and applications of the union hiring hall system.

* * * *

The union procedures in general constituted a motley fabric of arbitrary departures from the rules. I do not find that union's intentional discrimination was practiced in such a way as to exclude absolutely all minorities from entry or to deny absolutely all minorities from the benefits of employment. The gross disparities and other evidence are nevertheless persuasive that the union practiced intentional discrimination.

* * * *

K. *Glasgow, Inc. and the Associations*

The ground for liability of defendant class representative Glasgow, Inc. is, in the context of this defendant class suit, principally based upon the legal theory that Glasgow, like other contractors relying on the union's hiring hall, is liable at least injunctively under 42 U.S.C. § 1981 for the discriminatory acts of the union. This theory also embraces the defendant associations who participated in the creation or approval of an exclusive hir-

ing hall provision. In this sense, the only necessary proof against Glasgow in particular is that it relied contractually upon the hiring hall and is in that respect like other defendant class member contractors working in the 542 jurisdiction. The prerequisite participation of the four named defendant associations has also been proved. This proof, indeed, is not seriously contested.

Plaintiffs have also alleged intentional discrimination broadly throughout the defendant class of contractors and they have similarly alleged a conspiracy among contractors and the union. As discussed below, the intentional discrimination claim and the conspiracy claim are inapplicable in this defendant class context because of the individual questions presented. Plaintiffs have, however, offered much proof pertaining to Glasgow individually and I will discuss this briefly. The conduct of the associations particularly with respect to the "Affirmative Action Program" which substituted for the Philadelphia Plan demonstrated a reckless disregard for equal employment opportunity for minorities but will not be recounted here.

• • • •

While substantial evidence has been presented which plaintiffs assert demonstrates intentional discrimination or discrimination in impact by Glasgow, most of this evidence would be more appropriate in the damages stage of this litigation at which time Glasgow's practices could be evaluated together with the practices of other employers. Thus, I refuse to treat Glasgow separately from the other parties to the contract. Likewise I will not treat the associations separately.

III. *Legal Conclusions*

Remaining for consideration are the conclusions underlying my decision that the union and the defendant class of contractors and associations are liable at least in-

junctively for the discrimination practiced through Local 542. Discussed below are the issues pertaining to the certification of plaintiffs' class, the requirements of Title VII, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981, and finally the matter of the appropriateness of the defendant class.[43]

* * * *

b. *Section 1981 Claims Against Union*

In addition to their Title VII claim against 542, plaintiffs have argued that liability flows from 42 U.S.C. § 1981, which provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

In recent years § 1981 has emerged as an important provision in employment discrimination suits. *See, e.g., Young* v. *International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971). *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 55 L.Ed.2d 295 (1975), has made clear that § 1981 is not delimited by the procedural prerequisites of Title VII. *See Alexander* v. *Gard-*

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[43] Because of my decision on Title VII liability and liability under § 1981 and solely because those provisions permit complete and comprehensive relief, although as yet remaining to be determined, I do not here decide: (1) the issue of legal liability of the union under the National Labor Relations Act, 29 U.S.C. § 141 *et seq.* (1970) for breach of its duty of fair representation; or (2) the claim of a private action for discrimination in programs receiving federal funding under Title VI, 42 U.S.C. § 2000d *et seq.* (1970).

ner-Denver Co., 415 U.S. 36, 47 & n.7, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1973).

What has remained undecided by the Supreme Court is the appropriateness of specifically analogizing between the standards of proof required under Title VII, including the standard by which only a disparate impact need be shown, and those under § 1981. Although the foregoing finding of intentional discrimination on the part of 542 with respect to plaintiffs' Title VII claim is decisive under § 1981 as well, it remains to be examined whether § 1981 also permits a finding of discrimination upon proof of disparate impact alone.

The leading case holding that a § 1981 claim requires only proof of discriminatory impact is *Davis* v. *County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *cert. granted*, 437 U.S. 903, 98 S.Ct. 3087, 57 L.Ed.2d 1132 (1978). That case in effect adopted for § 1981 purposes the rationale of *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), that facially neutral employment practices which produce a disparate racial effect are actionable under Title VII. Both *Griggs* and *Davis* v. *County of Los Angeles* involved employment test procedures and requirements which were not validated as job-related. Specifically, *Davis* v. *County of Los Angeles* enjoined the use of a non-validated standardized test and a 5'7" height requirement for fire department employees. Both the test and the height requirement caused a disproportionate exclusion of Mexican-American job applicants.

Davis v. *County of Los Angeles* is significant in that it comes after *Washington* v. *Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), which expressly denied relief from an alleged discriminatory police employment testing procedure in the absence of proof of discriminatory motive. Although *Washington* did not involve a Title VII claim, the Court's holding did specify

that the denial of relief was based on constitutional (fourteenth amendment equal protection clause) and *statutory* grounds: "Respondents were entitled to relief on neither constitutional nor statutory grounds." *Id.* at 248, 96 S.Ct. at 2052. Justice Stevens, concurring in part, observed that the "actual statutory holdings are limited to 42 U.S.C. § 1981 and § 1-320 of the District of Columbia Code . . . ." *Id.* at 255, 96 S.Ct. at 2055. An argument does exist, therefore, that *Washington* may have foreclosed the issue, requiring that discriminatory motive be proven as a prerequisite to § 1981 relief. However, the Ninth Circuit in *Davis* v. *County of Los Angeles* distinguished *Washington* first by citing to apparent limitations in Justice White's majority opinion:

> Mr. Justice White prefaced Part II of the majority opinion with this statement: "Because the Court of Appeals erroneously applied the legal standards applicable in resolving the *constitutional issue* before it, we reversed . . . ." *Id.* at 239, 96 S.Ct. at 2046 (emphasis added).

566 F.2d at 1339. The thrust of the Ninth Circuit's rationale is that *Washington* never specifically discussed the § 1981 considerations and hence did not decide the scope of § 1981 liability. The court stated: "In the absence of any express pronouncement from the Supreme Court—a pronouncement not delivered in *Washington*—we are unwilling to deviate from this established practice [of equating Title VII with § 1981]." 566 F.2d at 1340.

It is interesting to note, however, that the dissenting judge on the Ninth Circuit's panel (Wallace, J.), while agreeing that *Washington* v. *Davis* was not decisive as to the § 1981 claim, stated that the legislative history of § 1981 should track the fourteenth amendment's standards of proof. Section 1981 was, however, first enacted pursuant to the thirteenth amendment before passage of the fourteenth amendment. It was then simply reenacted

in 1870 after the fourteenth amendment's passage to reassure that its provisions would not be held unconstitutional. Hence the linkage between the elements of a § 1981 cause of action and those of an action based on the equal protection clause seems unfounded. I therefore adopt the view that a § 1981 employment discrimination claim may be proven on roughly the same basis as a Title VII claim, including proof of disparate impact alone. In this view I agree with the majority in *Davis* v. *County of Los Angeles* and add that § 1981's close connection to the thirteenth amendment amply distinguishes the fourteenth amendment decision in *Washington.*[82]

c. *Section 1958(3)*

Another legal aspect of plaintiffs' case focuses upon the alleged conspiracy among the union, associations and contractors to discriminate intentionally against minorities. Because this claim depends largely upon the involvement of the associations and contractors, full discussion will await the consideration of their liability below.

2. *Claims Against Associations and Contractors*

a. *Section 1981*

While I have found the union liable under § 1981, a separate adjudication must be made as to whether the union's conduct in operating the hiring hall has caused the associations and contractors to be liable under that section. The evidence is not clear as to the quantum of specific and personal knowledge which the contractors and their associations may have had of the union's acts of intentional discrimination or the impact of their

[82] Because of the JATC's participation in the overall intentional discrimination of the union, there is no need to discuss its legal liability separately. The JATC is liable as the union is liable.

hiring hall policies. The fact is that the vast majority of individual contractors never hired a minority operating engineer; that the GBCA, CAEP, PECA and UCA signed a statement, relevant to federal approval of the "Affirmative Action Program" displacing the Philadelphia Plan, grossly exaggerating minority union membership; and that the gross disparity between the percentage of the minority representation in the labor pool and minority representation in the union along with a gross disparity in hours and wages of minorities as against the minority labor pool percentage is a matter of such broad scope that some or all contractors and associations might have had knowledge of it. Yet I find that the plaintiffs have failed to prove on a preponderance of the evidence that the associations or contractors viewed simply as a class were actually aware of the union discrimination affecting the employment of minority persons throughout the operating engineer industry in Local 542's jurisdiction. Such knowledge with actual participation in the hiring hall system would of course itself constitute intentional discrimination. I also find that not *all* contractors and associations may be said as a class to have had reasonable notice of the union's discrimination in view of the great number of contractors and the varying size and intensity of their work. Nevertheless, I find that the contractors and associations are injunctively liable to the plaintiff class under § 1981 as a result of their contractual relationship to and use of a hiring hall system which in practice effectuated intentional discrimination, whether or not the employers and associations knew or should have known.

Although no case has been found which imposes civil rights liability on the employer or association in these precise circumstances, there are several cases in which acts by union hiring halls favoring union members in violation of 29 U.S.C. § 158(a) of the National Labor Relations Act have created liability in an employer who

had neither knowledge nor reasonable notice of such acts. There are a few district court decisions in civil rights contexts, however, which hold or suggest that no such extension of liability from union to employer may be made. Added to this legal fabric are cases which, in interpreting the scope of Title VII or § 1981 liability, have held employers liable for the discriminatory impact of facially neutral terms of a collective bargaining agreement governing a hiring hall's operation.

My conclusion that as to the § 1981 claims the association and contractors can be liable for at least injunctive relief is predicated on my analysis of: (1) the analogous National Labor Relations Act cases; (2) the lower court Title VII and § 1981 decisions involving an employer who had no knowledge or reasonable notice of hiring hall discrimination against minorities; (3) Title VII cases in which an employer's agreement to a facially neutral hiring hall system had a discriminatory impact; and (4) cases and principles relating to the applicability of *respondeat superior* liability under § 1981.

1. *The NLRA Cases*

The plaintiffs seek to hold the class of defendant contractors liable vicariously for the acts of the union in its hiring hall operation. The rationale for such a view is that the employers by agreeing to a hiring hall arrangement have made the union their agent in hiring. *See NLRB* v. *H. K. Ferguson Co.*, 337 F.2d 205, 208 (5th Cir. 1964), *cert. denied*, 380 U.S. 912, 85 S.Ct. 898, 13 L.Ed.2d 798 (1965); *Morrison-Knudsen Co., Inc.* v. *NLRB*, 275 F.2d 914, 917 (2d Cir. 1960) (Swann, J.), *cert. denied*, 366 U.S. 909, 81 S.Ct. 1082, 6 L.Ed.2d 234 (1961); *cf. NLRB* v. *United States Steel Corp.*, 278 F.2d 896, 898 (3d Cir. 1960) (*en banc*), *cert. denied*, 366 U.S. 908, 81 S.Ct. 1083, 6 L.Ed.2d 234 (1961). I am persuaded by the rationale expressed most clearly in *Morri-*

son-Knudsen and hold that that rationale is applicable to the instant § 1981 action.

Morrison-Knudsen involved discrimination by the union hiring hall against nonunion workers. Such a practice was and is forbidden by 29 U.S.C. § 158(a)(1). The court's view was expressed in the following quotation:

> [*R*]*egardless of the extent of their* [*the employers'*] *knowledge* we agree with the Board that an employer may not avoid liability for violations of the Act by the hiring hall when he has turned over to it the task of supplying the men to be employed. The Local acted as agent for the petitioners in selecting the men to be hired. Its discriminatory acts, which unlawfully encourage membership in Local 545, are properly chargeable to the agent's principal as discriminatory acts by it. [275 F.2d at 917 (emphasis added)]

See H. K. Ferguson, supra, at 208.[53] Although not discussing the basis for its agency conclusion in detail, it seems clear that the *Morrison-Knudsen* court was concerned with the federal policy implications of immunizing an employer from liability for violations of the NLRA arising out of a function so typical to employers.

Of course, *Morrison-Knudsen's* expression of a vicarious liability rule has not been followed by all courts of

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[53] In *Ferguson* the court stated that by making the union its exclusive hiring hall it "made Goodman [the union's business agent] its agent in determining . . . eligibility for employment and by doing so became liable for any unfair practices committed by Goodman in connection with his hiring or refusing to hire." *Id.* at 208. Although there is no discussion of the employer's knowledge of the specific discriminatory referral revocations involved in *Ferguson*, the court also described the employer's involvement as "condoning" or "acquiescing" in encouragement of union membership.

appeals. [See Appendix for balance of discussion of NLRA cases] * * *

* * * *

In summary, I find the *Morrison-Knudsen* rationale to be applicable here. The decision in *United States Steel* that a master mechanic was agent for both the employer and the union further indicates the appropriateness of finding the hiring hall an agent of the employer in an NLRA setting. I see no reason—statutory or policy—why this conclusion should be any different in a civil rights setting.

2. *Civil Rights Cases Rejecting Vicarious Employer Liability*

In contrast to the rationale of *Morrison-Knudsen*, defendants rely on certain § 1981 and Title VII cases which purportedly hold that there can be no automatic employer liability upon proof of a union's discriminatory operation of a hiring hall. *Allen* v. *Pipefitters Local Union No. 208*, 56 F.R.D. 473 (D. Colo. 1972) and *Vogler* v. *McCarty, Inc.*, 294 F.Supp. 368 (E.D. La. 1968) *aff'd on other grounds sub nom. Local 53* v. *Vogel*, 407 F.2d 1047 (5th Cir. 1969). While I recognize that these cases are partially in conflict with my holding that employers are liable for the acts of a hiring hall, I find them to be unpersuasive and, in some respects, factually and analytically distinguishable. [See Appendix for balance of discussion of cases rejecting vicarious liability] * * *

* * * *

In summary, *Vogler* and *Allen*, although directly rejecting a vicarious liability theory in a civil rights context, do not represent a decisive analysis of the issues and cite no authority for their holdings. *Byrd*, while in apparent agreement with the *Allen* and *Vogler* position,

did not have to reach the issue of vicarious liability because of allegations of direct acts by the employer associations.

In *Rios*, [v. *Enterprise Ass'n Steamfitters*, 400 F.Supp. 988 (S.D. N.Y. 1975), *modified*, 542 F.2d 579 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977)] a slightly different type of case, the district court's decision was to absolve an association of monetary (but not injunctive) liability where no act by the association was shown to be connected to the union's hiring discrimination. On appeal, that aspect of *Rios* was affirmed with the observation that acquiescence by an association would provide a sufficient basis for back pay liability but that because no specific act of discrimination was proven against the agency the refusal by the district court to hold it liable for back pay was not an abuse of discretion. Similarly, *Guerra* was a case in which the Court of Appeals declined to view as an abuse of discretion the district court's refusal to require an employer to pay monetary damages under § 1981 where, although both employer and union agreed to a hiring hall system which was itself discriminatory, the union was principally responsible.

In view of this reading of the civil rights cases involving a union hiring hall, there is no persuasive reason to reject the theory of vicarious liability of employers for discrimination by the union in its hiring hall operation. Indeed the Second Circuit Court of Appeals decision in *Enterprise Association Steamfitters* supports the vicarious liability theory.

3. *Cases In Which an Employer or Employer's Association Was Held Liable for Discrimination Arising From Terms of Contract*

There do exist cases in which, either under Title VII or § 1981, participation in a collective bargaining agree-

ment having a discriminatory impact justified imposition of liability upon an employer, an employer association or a union, even though there was no specific showing of an intent to discriminate. *E.g.*, *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837 (5th Cir.), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977); *Carey* v. *Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Robinson* v. *Lorillard*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); *National Organization for Women, Inc.* v. *Minnesota Mining and Manufacturing Co.*, 73 F.R.D. 467 (D. Minn. 1977). Each of these cases, however, involved seniority systems arising under the collective bargaining agreement and in each of the cases it was the seniority system which was said to have perpetuated past discrimination. Importantly, these cases were decided prior to the Supreme Court's decision in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), which upheld as lawful seniority systems of a bona fide character though they may in effect perpetuate pre-Act discrimination.[57]

Nevertheless, the above-cited cases still have important precedential impact. Apart from the narrow question whether a bona fide seniority system provided for by contract is statutorily exempt from liability, these cases instruct that all parties to a collective bargaining agree-

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[57] The basis for this holding was the interpretation given to 42 U.S.C. § 2000e-2(h), which provides in part as follows:

> Notwithstanding any other provision of this sub-chapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race . . . or national origin . . . .

ment which by its terms has a discriminatory impact can bear civil rights responsibility.

It must be emphasized that these decisions do not explicitly resolve the question whether under § 1981 a union hiring hall's acts may be imputed to an employer for liability purposes in the absence of proof of knowledge, notice or intent. The cases are decided either under Title VII, which according to *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), creates liability merely from discriminatory effects of facially neutral hiring practices, or under § 1981 with the view (as accepted here) that liability requires no proof of purposeful conduct on the part of any of the defendants. These cases give analytical support to plaintiffs' vicarious liability theory in the present case.

* * * *

Acknowledging that in each of the above cases the union and employer are interconnected via the bargaining agreement, which *itself* is the cause of the discriminatory impact in violation of § 1981 or Title VII, these decisions make an important point. If the state of mind of the parties, being presumed neutral, cannot establish a defense to a Title VII or § 1981 violation, it is a short conceptual step to hold liable an employer who agrees to a facially neutral agreement with a union who proceeds to create a discriminatory impact by acting (intentionally or not) outside the agreement. It may be said that an employer's duty to insure that the terms of a neutral agreement will not have discriminatory effects is different from the duty to see that no discrimination takes place outside the agreement. But that distinction does not seem meaningful where the alleged union discrimination arises from so important a feature of a collective bargaining agreement as the day-to-day operation of an exclusive hiring hall.

In a case involving discrimination that is given effect by the hiring hall, it might quite as forcefully be said that the union and employer have an "affirmative duty" to prevent discrimination and that the employer cannot use a union "for a shield."

4. *Doctrine of Respondeat Superior*

Respondeat superior, a doctrine centuries old, is predicated on the assumption that a master, employer, or principal will be held responsible for the acts of a servant, employee, or agent respectively. The rationale for this view is succinctly expressed by the maxim, *qui facit per alium facit per se* (he who acts through another acts himself). *See, e.g.*, 3 Am. Jur. 2d *Agency*, § 261, at 626-27 (1962). In the instant case the issue is whether the acts of the union representatives at the hiring hall were, as a matter of law, also the acts of the contractor associations and the contractors who had agreed to this exclusive hiring system. At the outset we are confronted with a line of cases in which some lower courts appear to have held broadly that the concept of *respondeat superior* does not apply in civil rights cases. Thus we must examine, first, whether a defendant in a civil rights action should be exempt from vicarious liability and then we must consider whether the doctrine of *respondeat superior* is on its own terms applicable in the present setting.

(a) *Analogies to Civil Rights Suits Against Municipalities or Supervisory Personnel*

As observed above, it has sometimes been stated axiomatically that *respondeat superior* does not apply in civil rights cases. *E.g.*, *Cochran* v. *Rowe*, 438 F.Supp. 566 (D. Ill. 1977); *Taylor* v. *City of Selma*, 327 F.Supp. 1191 (S.D. Ala. 1971); *Sanberg* v. *Daley*, 306 F.Supp.

277 (N.D. Ill. 1969) (differentiating between monetary and injunctive relief). The courts in these cases, however, and in many of the cases articulating the seeming "axiom," were confronted with the question of the liability of a municipal entity under § 1983 for acts of its agents. Each case was decided prior to *Monell* v. *Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and was therefore predicated on the holding of *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), that because municipalities were not persons for purposes of § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3), they were absolutely immune from liability under that section. The rejection of vicarious liability contained in these lower court decisions does not signify a general inapplicability of vicarious liability in civil rights cases which were never subject to the jurisdictional limitations of the Civil Rights Act of 1871, § 1983's precursor.

Since *Monell*, of course, municipalities, while still not subject to vicarious liability, may be sued under § 1983 for infringements of civil rights arising from a municipal policy, custom or act. Although overruling *Monroe*, *Monell* confirms that in a § 1983 suit against a municipality, *respondeat superior* is unavailable specifically because of statutory language and legislative history having no bearing on § 1981. In *Monell* the Supreme Court expressly hinged its rejection of *respondeat superior* in § 1983 suits against a city on "Congress' rejection of the only form of vicarious liability presented to it" (*i.e.*, the proposed Sherman amendment and on "the absence of any language in § 1983 which can easily be construed to create *respondeat superior* liability." *Id.* 98 S.Ct. at 2037, n.57. Of course, the rejection of the Sherman amendment imparts no significance for § 1981 whose precursor was the Act of 1866. *Mahone* v. *Waddle*, 564 F.2d 1019, 1030-36 (3d Cir. 1977). Furthermore, whereas § 1983 is phrased as a prohibition which might be construed to

be applicable only to individual actors,[59] § 1981 is phrased so as to grant broadly a positive right and creates no comparable inference. Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

In addition to cases involving suits against municipalities, there is also a line of cases under § 1983 (raising the vicarious liability issue) in which supervisory police, prison or other governmental officials are defendants. Typically, *respondeat superior* is rejected. *E.g.*, *Hampton* v. *Holmesburg Prison Officials*, 546 F.2d 1077, 1082 (3d Cir. 1976); *Milton* v. *Nelson*, 527 F.2d 1158 (9th Cir. 1976) (§§ 1981-1983); *Johnson* v. *Glick*, 481 F.2d 1028, 1034 (2d Cir.) (Friendly, J.) (limiting holding to damage claims), *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed2d 32 (1973); *Jennings* v. *Davis*, 476 F.2d 1271 (8th Cir. 1973); *Adams* v. *Pate*, 445 F.2d 105 (7th Cir. 1971). *But see Holland* v. *Connors*, 491 F.2d 539 (5th Cir. 1974).[60] The Supreme Court in *Rizzo* v.

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[59] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[60] Another less familiar setting in which vicarious liability claims have been raised is in § 1983 or § 1985 cases in which private

Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), confirmed that at least with respect to equitable decrees against police department officials, where considerations of comity arose, liability may not be founded on a vicarious liability theory. But as was pointed out by the Third Circuit in *Rizzo* v. *Goode*, 506 F.2d 542 (3d Cir. 1974), *rev'd on other grounds*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), the theory of vicarious liability is inapplicable on its own terms in such situations and is not rendered inapplicable by any peculiarly civil rights related rationale. The Third Circuit Court of Appeals observed:

> *Respondeat superior* is not applicable in its traditional sense since the defendant officials are not employers. Both subordinates and officials are employees of the governmental unit. [*Id.* at 550]

See, e.g., Kite v. *Kelley*, 546 F.2d 334, 337 (10th Cir. 1976).

Because of the complete inapplicability here of considerations of federal-state comity, absolute municipal immunity, and immunity of governmental supervisory personnel, the above-listed cases purporting (or seemingly purporting) to exclude *respondeat superior* liability

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parties are alleged to have participated with state officials. Two such cases are *Draeger* v. *Grand Central, Inc.*, 504 F.2d 142 (10th Cir. 1974), and *Croy* v. *Skinner*, 410 F.Supp. 117 (N.D.Ga. 1976).

In *Draeger* an off-duty police officer was serving as a security guard for a private store. Although off-duty, the policeman still had authority to make police arrests. Considering the question whether the employer-store was liable for the alleged illegal arrest by their security guards, the court held that *respondeat superior* was not applicable. However, in *Croy* v. *Skinner*, 410 F.Supp. 117 (N.D.Ga. 1976), Judge Freeman stated a more expansive approach. Relying on *Carter* v. *Estelle*, 519 F.2d 1136 (5th Cir. 1975), he said that upon an allegation of conspiracy under § 1985 between bank officials and state officials to instigate a false prosecution the bank which employs the involved officials could be liable vicariously.

from civil rights cases properly have no bearing on the present issue.

* * * *

Based upon the foregoing analysis, I conclude that the plaintiff's claim under the "contracts" component of § 1981 may properly be based on a *respondeat superior* theory, at least to hold the defendant class of employers and the associations injunctively liable for the discrimination by the union in the hiring hall.

(b) *The Application of the Doctrine of Respondeat Superior*

Under every test of agency the union hiring hall was the agent for two principals—the union and the contractors, with their respective associations. After the contractors delegated authority to the persons operating the hiring hall, can the contractors and associations now be granted absolute immunity from the illegal acts of the hiring hall?

The union hiring hall was, after all, designed to supply the employers with workers and replace the traditional system of direct applications. There is no suggestion here that such delegation is of itself improper, but once it is made the employers relying on it cannot absolve themselves of all responsibility for that delegation even if they are unaware that their collective workforce is the product of intentional discrimination. Nor is it enough that the employers and associations might have liked to avoid a hiring hall system but were forced to acquiesce due to economic considerations. Economic considerations affecting bargaining process raised here by defendants do not provide an excuse from duties incident to employee selection in this case. *See Lorillard, supra.* Indeed, the employers, particularly through their associations, had the potential collective capacity to be generally conscious of possible discrimination in the hir-

ing hall and to seek to correct it by enforcing the provisions governing the operation of the hiring hall or (at least after May, 1971) by enforcing the non-discrimination provision of the contract. The employers could have taken other actions designed to dissuade the union from a pattern and practice of discrimination in carrying out its duties to supply the employers with operating engineers. The evidence reveals they did nothing whatsoever. The delegation of the employee application process to 542 simply did not effect a withdrawal from reality. *See Carey, supra*; *Lorillard, supra.*

There is clear support in Restatement (Second) of Agency for the view which in effect underlies the conclusion reached in *Morrison-Knudsen* and to some extent in *United States Steel,* that a relation can exist between an employer or group of employers and an exclusive union hiring hall rendering applicable the rationale of vicarious liability.[61] Analogy to Section 214 of the Re-

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[61] Section 1, Restatement (Second) of Agency (1958), states:

> (1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
>
> (2) The one for whom action is to be taken is the principal.
>
> (3) The one who is to act is the agent.

In serving as an exclusive hiring hall Local 542 was certainly acting on behalf of its members but was also acting on behalf of the employers in replacing traditional direct employment application processes. The bargaining agreement, either signed by the employers or otherwise adopted, manifests the requisite mutual consent. As to the right of control, the important issue is whether the employers retained power to oppose the union discrimination. As pointed out above, the employers were by contract entitled to a hiring hall operation which adhered to the terms provided. The contract required division of all applicants into experience-related classifications and referral in accordance with specified priorities. These matters were not beyond the potential control of the em-

statement (Second) of Agency is instructive, keeping in mind that an employer can no more easily shed his legal duty under § 1981 than under Title VII not to practice intentional discrimination or produce a discriminatory impact through facially neutral practices in the employment application process:

> A master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty.[62]

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ployers. Furthermore, a grievance procedure was established (for all relevant periods) by which complaints by applicants against the operation of the hiring hall could be made. This procedure would involve participation of an employer representative. Also, the bargaining agreement expressly provided since May, 1971, that referrals, the ultimate product of the hiring hall, not be made on a racially discriminatory basis. These indicia give far more by way of control than existed in *United States Steel, supra,* where not even express managerial resistance was effective to stop a master mechanic from choosing only union members as assistants and where that master mechanic was held to be an "agent" of the employer tying him to the illegal hiring. Agency principles establishing traditional bases for the spreading of risk and responsibility which the doctrine of *respondeat superior* seeks generally to accomplish, serve as an important guide in this case, just as they served to guide the court in *Morrison-Knudsen* and *United States Steel.*

[62] It should be noted also that *comment a to § 214, Restatement (Second)* of Agency, in defining liability for a breach of a nondelegable duty states:

> [O]ne may have a duty to see that due care is used in the protection of another, a duty which is not satisfied by using care to delegate its performance to another but is satisfied if, and only if, the person to whom the work of protection is delegated is careful in giving the protection.

Duties arising under § 1981, manifestly, are no more subject to being bargained away than were the Title VII duties in *Lorillard.*

The duty to see that discrimination does not take place in the selection of one's workforce must, as was clearly suggested in *Carey* and *Myers, supra*, remain with the employer if it is to have full meaning. Employers cannot be permitted, collectively or individually, to use the union as a shield and become oblivious to discriminatory practices whose true harm is revealed in the composition of their own employees. It is still the employer who contracts to hire individuals, even in a hiring hall setting, and that employer should not be free from all responsibility to take steps to alleviate discrimination when found simply because he may be blind to the racial composition of the pool from which workers are referred. Injunctive remedial relief should quite properly be available against such an employer or employers to eliminate discrimination when found.

The contention that each employer's workforce must be examined individually before even injunctive liability under § 1981 can be found misperceives the thrust of a *respondeat superior* theory of liability. It is the mass of employers collectively who by originally agreeing to or subsequently adopting the exclusive hiring hall provision, effectuated a *collective* delegation of the employment application process. Because of this delegation the intentional discrimination of the union was able to work its way broadly into the common workforce of operating engineers. Inasmuch as the delegation of the application procedure was meant to be industrywide within 542's jurisdiction, and is a product of all those employers agreeing to a single arrangement, those employers must together share responsibility, at least injunctively, for the discrimination by the union. Summarized simply, two elements are necessary to this conclusion and have here been satisfied: (1) the employers delegated an important aspect of their hiring procedure to the union; (2) the union, in effectuating the delegation, intentionally

discriminated or, alternatively, produced a discriminatory impact. The acts of the union therefore justify imposition of responsibility upon those employers participating in the original delegation.

Although plaintiffs have failed to show intent to discriminate by the employers as a class, and indeed have been unable to show knowledge or notice of discrimination by that class as a whole, plaintiffs have shown that the requisite relationship exists among employers, associations, and union to render applicable the theory of *respondeat superior*, thus making employers and associations liable injunctively for the discriminatory acts of the union.

* * * *

b. *Employers and Associations Potential Liability Under § 1985(3)*

* * * *

* * * Not even acquiescence of the whole class of employers in the sense of a conscious toleration of the discrimination of the union has been shown. Absent such class-wide proof, no § 1985(3) claims could be upheld even on this expansive theory. Furthermore, to the extent that individualized proof against particular employers may be necessary to establish a § 1985(3) claim, it is not appropriately raised against a class of defendant employers.

The liability of the associations under § 1985(3) raises a closer question because of their involvement in dramatically misstating the minority population of 542 in avoiding application of the Philadelphia Plan. Nevertheless, despite this reckless disregard for the accuracy of these figures and other proof of incation, I do not on the present record find actual knowledge of the formal error

in figures or of union discrimination generally. . . .[64] . . .[65]

* * * *

December 23, 1980

MEMORANDUM OPINION

BECHTLE, District Judge.

On May 29, 1980, this Court entered Post Decree Order #10, in which various costs directly related to the injunctive aspects of this litigation were assessed against certain named party defendants in specified percentage allocations. This Memorandum Opinion sets forth further reasoning and authority for the issuance of that Order.

* * * *

It is this difficult but necessary allocation of those costs which are directly related to the injunctive aspects of this litigation that formed the subject of Post Decree Order #10[5] and this Opinion.

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[64] The basis for liability of the class of defendant associations and contractors is § 1981. The redefinition of defendant class to comport with the six-year statute of limitations is therefore appropriate.

(a) All employer associations who have been parties to a collective bargaining agreement with defendant Local 542 at any time between November 8, 1965, and the date of this decree; and

(b) All employers who have been parties to a collective bargaining agreement with Local 542 and who hired at least one operating engineer affiliated with Local 542 at any time between November 8, 1965, and the date of this decree.

[65] Only Glasgow itself need be considered in evaluating the adequacy of representation. The presence of four associations as named defendants reassures that a thorough representation was provided.

[5] In Post Decree Order#10, the Court ordered the following percentage allocations of injunctive-related costs against the six

The major argument advocated by many of the named and unnamed defendants is that, although they have been held injunctively liable, they cannot be assessed costs related to that injunction when the only theory of liability upon which they were held injunctively liable is that of vicarious responsibility for the discriminatory acts of Local 542 and the JATC. Therefore, they argue, the Local and the JATC are the primary responsible or faulting parties and should be assessed the full injunctive costs.

* * * *

* * * In the instant case, the finding of liability was that the contractors' associations and the contractor-employers were not aware of the discriminatory entrance and referral practices of the Local's hiring hall, or even that they should have been aware of such discriminatory acts. Rather, Judge Higginbotham held that:

> Yet I find that the plaintiffs have failed to prove on a preponderance of the evidence that the associations or contractors viewed simply as a class were actually aware of the union discrimination affecting the employment of minority persons throughout the operating engineer industry in Local 542's jurisdiction. Such knowledge with actual participation in the hiring hall system would of course itself constitute intentional discrimination. I also find that not *all* contractors and associations may be said as a class to have had reasonable notice of the union's discrimination in view of the great number of con-

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named defendants: Local 542—40%; JACT—25%; CAEP—10%; UCA—10%; GBCA—10%; and Glasgow, Inc.—10%.

To date, the following total sums have been paid by the following parties for costs found by the Court to be directly related to the injunctive aspects of this action: Local 542—$36,056; JATC—$22,534; CAEP—$9,013; UCA—$9,013; GBCA—$9,013; and, Glasgow, Inc.—$4,506 (Total paid: $90,135). *See* Post Decree Orders 13, 14, 17 and 18.

> tractors and the varying size and intensity of their work. Nevertheless, I find that the contractors and associations are injunctively liable to the plaintiff class under § 1981 as a result of their contractual relationship to and use of a hiring hall system which in practice effectuated intentional discrimination, whether or not the employers and associations knew or should have known.

469 F.Supp. at 401. However, this Court finds that the degree of responsibility or the degree of passivity is not an issue totally precluding those passive defendants from being assessed any injunctive-related costs but, rather, goes to the further question of what percentage of those costs they should bear in light of the finding of liability to date.

At present, the finding of collective injunctive liability carries with it a finding of shared responsibility not only for certain aspects of that injunction including reporting requirements and hour-and-wage goal requirements, but to collectively bear the costs that are necessitated by that same injunctive mandate. Basic fairness demands collective assessment. Again, notions of equity do come into play when a determination must be made as to what portion of the costs should be shared among the various parties. It is only that issue that goes to the degree of responsibility under the notions of primary and passive liability under a theory of vicarious responsibility. Fairness would be abrogated if the full share of injunctive-related costs were assessed against the primary responsible party, while at the same time the full share of the injunctive liability is not.

Intertwined with these critical notions is another distinguishing factor this case bears from the cases cited by Local 542 in its memorandum of law—that factor being that the costs assessed in each case concerned costs

the plaintiffs had incurred during the course of the litigation and were not costs directly related to the implementation of injunctive relief. The important distinguishing point of this factor is that, while payment of plaintiffs' litigation costs would help to make the plaintiffs whole again and encourage plaintiffs in general to file discrimination actions, *see New York Gaslight Club, Inc., et al.* v. *Carey*, —— U.S. ——, ——-——, 100 S.Ct. 2024, 2029-2030, 64 L.Ed.2d 723 (1980), payment of injunctive costs serves another purpose—as previously stated, that being to effectuate the injunction by defraying costs that are necessarily built into that injunction and which must be paid in order to successfully further the injunctive relief ordered. In the present case, for example, the costs of notices to class members is essential in order to have notices sent to both plaintiff- and defendant-class members to, in all fairness, bind them to the injunctive relief ordered. Without notice, they cannot be expected to be bound by the injunctive requirements placed upon them as members of the defendant-class or to pay those costs associated with the injunction. *See In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1102-1106 (5th Cir. 1977). This type of cost does not further the purposes set forth in *New York Gaslight, supra*, but, rather, goes to the heart of the action—the injunctive relief requested.

In support of their position that defendants held injunctively liable under a theory of vicarious responsibility cannot be assessed costs, named party defendants Glasgow, Inc., and the three defendant contractors' associations refer the Court to the case of *Rios* v. *Enterprise Ass'n Steam-Fitters Local 638 of U.A.*, 400 F. Supp. 988 (S.D.N.Y. 1975). There, the court held that the primary force behind the discrimination against minority workers was Local 638, but held the Local, the Mechanical Contractors Association ("MCA") and the

Steamfitters' Joint Apprenticeship Committee ("SJAC") injunctively liable. * * *

Finally, as to the issue of costs, the court found that Local 638 alone should be assessed the plaintiffs' full costs and that no costs should be assessed against either the MCA or the SJAC. 400 F.Supp. at 998.

The applicability of the *Rios* decision to the instant action must be seriously questioned. First, the *Rios* court offered no authority or rationale as to why the Local alone should bear the plaintiffs' full costs, where all the defendants were found injunctively liable. Furthermore, the Rios court not only assessed all the costs against Local 638 but awarded backpay to the plaintiffs to be paid solely by the Local. In the instant action, no damages of any kind have been assessed against any defendant. That issue has been expressly reserved for Stage II of the litigation. Therefore, whether the *Rios* court, faced with the instant factual and legal scenario, would have assessed costs in a similar manner is questionable and only serves to undermine any precedential weight the decision might have otherwise held. Finally, as Judge Higginbotham noted in his liability decision in this case, on appeal of the *Rios* decision, the Court of Appeals for the Second Circuit *in dictum* appeared to equivocate when discussing the potential liability of MCA. In that regard, the circuit court held:

> The *Rios* plaintiffs argue, not without reason, that this relief could not have been ordered absent a finding of discrimination by MCA, purposeful or otherwise, and that all that is required to establish MCA's liability for backpay is the finding of discrimination; indeed, mere acquiescence in the discriminatory acts of the union would render it liable. *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d [1364] at 1381-82; *Macklin* v. *Spector Freight Systems, Inc.*,

> 156 U.S.App.D.C. 69, 478 F.2d 979, 989 (1973). *See also Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), *petition for cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971). Absent any specific finding of discrimination, however, we conclude the district court's finding of nonliability on the part of MCA is not an abuse of discretion. *Guerra* v. *Manchester Terminal Corp.*, *supra*, 498 F.2d [641] at 655-56. As the district court held, making MCA a party defendant did not imply that MCA was "responsible *ipso facto* for all the employment practices . . . found unlawfully discriminatory or . . . liable in damages to the plaintiffs in *Rios*. Plaintiffs have shown so [sic] specific instances of MCA discrimination." 360 F.Supp. at 995. And the union certainly had primary responsibility for the discrimination. We note that the decision below was without prejudice to any claim a member of the plaintiff's class may have against an employer, but MCA was not itself an employer, and no employers are parties to this action. *See* 400 F.Supp. at 992 n.4.

Equal Emp. Op. Com'n v. *Enterprise Ass'n Steamfitters*, 542 F.2d 579, 589 (2d Cir. 1976).

In regard to that language, Judge Higginbotham stated:

> It may be inferred from the above dictum that acquiescence (presumably involving some meaningful level of knowledge or notice) constitutes sufficient involvement by a contractor's association to require holding it liable for back pay relief under Title VII. But it may be inferred from the holding that either back pay liability or injunctive liability without back pay may be imposed in the absence of "acquiescence" and without specific discriminatory acts in the dis-

> cretion of the trial court. Certainly neither the district court opinion nor the Court of Appeals' opinion in *Enterprise Association Steamfitters* supports the conclusion that an association or employer bearing a legal contractual relation to a union is insulated from liability for the union's discriminatory acts in the absence of participation in or knowledge of such acts. Indeed, the Court of Appeals' affirmance of injunctive liability in the absence of "any specific finding of discrimination" supports an opposite conclusion.

469 F.Supp. at 405-406.

Finally, the *Rios* decision concerned the assessment of plaintiffs' costs incurred throughout the litigation, of which "97% of these costs [were] attributable to court reporters' fees and the costs incident to taking depositions." 400 F.Supp. at 997. As discussed previously, plaintiffs' litigation-related costs are distinguishable from injunctive-related costs, because their imposition serves different purposes and brings into consideration notions of fairness that may not be as compelling when assessing litigation costs. For present purposes, the Court finds that the imposition of injunctive-related costs against both the primary and passive responsible defendants in this action is necessary and fair and is an issue that was not raised in the *Rios* case. Therefore, this Court believes it is not bound by nor persuaded to follow that decision.

* * * *

In regard to the percentage allocation of costs set forth in Post Decree Order #10, that assessment was made upon what the Court believed to be the delineated degree of responsibility of the defendants for the discriminatory acts, as set forth by Judge Higginbotham in his findings of fact and conclusions of law. The allocation was not made with mathematical precision and cannot be. Rather, it was based upon what the Court per-

ceived to be the participation in and knowledge of the various parties of the discriminatory acts found. Local 542 and the JATC, as the primary responsible parties, were assessed the greatest share of the costs. The contractors' associations, whose involvement in and apparent knowledge of the discriminatory acts found was not as great, were assessed a lesser percentage but more than Glasgow and the defendant-class of contractor-employers who were found to not have had any knowledge of the discriminatory actions by the Local and the JATC, nor actually negotiated collective bargaining agreements with the Local nor been signatories to the previous "Affirmative Action Program" which was found by Judge Higginbotham to be founded upon distorted statistics, *see* 469 F.Supp. at 342-345, 384, and only constitutes one contractor-employer as opposed to the associations which contain substantially more members.

* * * *

Supplemental Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

SUPPLEMENTAL MEMORANDUM FOR PETITIONER

JOHN G. KESTER *
JOHN J. BUCKLEY, JR.
Hill Building
Washington, D.C. 20006
Attorneys for Petitioner

Of Counsel:

WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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---

SUPPLEMENTAL MEMORANDUM FOR PETITIONER

We wish to call to the Court's attention a decision last week by the Third Circuit that makes a grant of certiorari here even more imperative. *Croker* v. *Boeing Co.*, Nos. 1569/70, Third Circuit, September 30, 1981 (*en banc*).[1]

As a result of that decision, the Third Circuit *en banc* by different groups of judges and with no explanation has interpreted 42 U.S.C. § 1981 in opposite ways in two cases. In the present case it ruled 3-3 that merely because Petitioner signed a labor contract, Petitioner could be held liable under § 1981 without proof Petitioner intended to discriminate, or even knew or had reason to know of discrimination, and even though Petitioner did

---

[1] A copy of the preliminary print has been filed with the Clerk.

not control anyone who did. Then in *Croker* the court of appeals held 5-4 that, outside the hiring-hall context, § 1981 does require proof of a defendant's intent to discriminate in order to hold a defendant liable.

The holding of the present case remains in conflict with holdings of six other circuits, while in accord with a dictum in one other. See petition for certiorari at 9-10. It still is an issue as to which "Guidance from the Supreme Court . . . has been eagerly awaited." *Guardians Ass'n* v. *Civil Service Comm'n*, 633 F.2d 232, 264 n.61 (2d Cir. 1980). The holding below also conflicts with this Court's rejection of vicarious liability under another section of the same 1866 Civil Rights Act in *Rizzo* v. *Goode*, 423 U.S. 362 (1976), and *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978).[2]

Like treatment of litigants similarly situated now has become an additional reason for this Court at last to resolve this overripe issue. If certiorari and plenary hearing were not granted, the only appropriate disposition would be to vacate and remand to the Third Circuit for reconsideration in light of its own later decision.[3] How-

---

[2] Moreover, other conflicts in the circuits exist regarding other issues presented in the petition for certiorari. There still is a conflict with the First and Second Circuits on the question whether an adjudicated non-wrongdoer may be forced to contribute to the enormous expenses of a remedial injunction. See petition for certiorari at 13. There also is a conflict with *City of Milwaukee* v. *Saxbe*, 546 F.2d 693 (7th Cir. 1976), and *Rizzo* v. *Goode*, *supra*, on the question whether Pennsylvania had standing to sue. See petition for certiorari at i, 9.

[3] This Court has observed that "desirable judicial administration commends consistency at least in the more or less contemporaneous decisions of different panels of a Court of Appeals." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). It has granted certiorari to assure this. *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950); *John Hancock Mut. Life Ins. Co.* v. *Bartels*, 308 U.S. 180, 181 (1939).

ever, because of three recusals the full bench of that court is not available, another tie vote might result, and "en banc is particularly inappropriate and unsatisfactory in the cases before us, since two [here, three] of our active judges are disqualified from participating." *Green* v. *Santa Fe Industries, Inc.*, 533 F.2d 1309, 1310 (2d Cir. 1976), *reversed on other grounds*, 430 U.S. 462 (1977).

CONCLUSION

For the reasons stated, the petition for certiorari should be granted and the case set for argument. If that is not done, the judgment should be vacated and the case remanded to the court of appeals for reconsideration in light of that court's subsequent decision in *Croker* v. *Boeing Co.*, *supra*, and of this Court's decisions in *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Monell* v. *Department of Social Services*, *supra*.

Respectfully submitted,

JOHN G. KESTER
JOHN J. BUCKLEY, JR.
Hill Building
Washington, D.C. 20006
Attorneys for Petitioner

Of Counsel:

WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

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Appendix

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IN THE

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OCTOBER TERM, 1981

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Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN G. KESTER

JOHN J. BUCKLEY, JR.
Hill Building
Washington, D.C. 20006
Attorneys for Petitioner

Of Counsel:

WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 80-2073/74 & 80-2161/62/63

COMMONWEALTH OF PENNSYLVANIA, [*et al.*]

v.

LOCAL UNION 542, INTERNATIONAL UNION OF OPERATION ENGINEERS, [*et al.*]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 71-2698)

Argued February 24, 1981

Before: WEIS and GARTH, *Circuit Judges* and MILLER, *Judge, Court of Customs and Patent Appeals* *

Reargued May 12, 1981 In Banc

Before: SEITZ, *Chief Judge*, ALDISERT, GIBBONS, HUNTER, WEIS, and GARTH, *Circuit Judges*

(Filed May 19, 1981)

[List of attorneys omitted]

OPINION OF THE COURT

PER CURIAM:

To the extent that the judgment of the district court is challenged by these appeals, it is affirmed by an equally divided court.

---

* The Honorable Jack R. Miller, United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 71-2698

COMMONWEALTH OF PENNSYLVANIA [*et al.*]

v.

LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS [*et al.*]

November 30, 1978

OPINION

HIGGINBOTHAM, A.L., C.J.*

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I. INTRODUCTION

This employment discrimination suit was instituted in 1971 by twelve black plaintiffs on behalf of a class of minority workers involved in or desiring admittance to the operating engineer trade in Eastern Pennsylvania and Delaware. Also a named plaintiff is the Commonwealth of Pennsylvania, suing on behalf of its citizens and the above-described class. Defendants in this action are as follows: Local 542 of the International Union of Operating Engineers; a class assertedly represented by Glasgow, Inc., consisting potentially of more than 1400 construction contractors and employers receiving referrals through Local 542's exclusive hiring hall; four construction trade associations which represent the employers in contract negotiations;[1] and the Joint Apprenticeship Training Committee ("JATC"), an organization created by Local 542 and the trade associations for the induction of new operating engineers. This opinion constitutes the findings of fact and conclusions of law relevant to the liability stage of the trial of this massive and intricate case.

[1] Those trade associations are: Contractors Association of Eastern Pennsylvania; General Building Contractors Association, Inc.; Pennsylvania Excavating Contractors Association; and United Contractors Association.

The active claims of plaintiffs' class include a Title VII, 42 U.S.C. § 2000e et seq., employment discrimination claim against all defendants based upon alleged discrimination in the membership practices of 542, the operation of its referral system, and the hours and wages of minority operating engineers. The foundation of this claim also serves as the basis for a 42 U.S.C. § 1981 claim and a conspiracy claim under 42 U.S.C. § 1985(3) against all defendants, an unfair representation claim under 29 U.S.C. § 158 against Local 542, and a Title VI discrimination claim against all those of the defendants who have deprived minority individuals of the benefits of federally funded construction projects. Local 542's function as an exclusive hiring hall in its geographical jurisdiction is at the center of each of the above claims; however, plaintiff asserts that the contractors and associations, having agreed to such a system in 1961 or thereafter, are co-participants with the union and cannot be absolved from liability for discrimination in the operation of the hiring hall. Although plaintiffs have frequently characterized their action as being based on intentional discrimination they are not limited to this standard particularly in view of the broad allegations in the complaint. I must therefore consider plaintiffs' factual claims in light of the full range of potential liability under the civil rights statutes involved.

Of course, a very significant aspect of the instant suit is its class action status. As originally certified on March 13, 1972, plaintiffs' class was divided into the following subclass descriptions:

(a) all minority group members who currently have the skills, when measured by objective standards, of at least a journeyman operating engineer and who work, or may work, within the territorial jurisdiction of defendant Local 542;

(b) all minority group members who are partially skilled, when measured by objective standards, to

perform operating engineers work and who work, or may work, within the territorial jurisdiction;

(c) all unskilled minority group members who wish, or may wish, to acquire skills in the operating engineers trade and who are physically capable of acquiring such skills and ptrforming operating engineers work within the territorial jurisdiction of defendant Local 542.

Among a number of threshold issues in this case, I also have before me a request by plaintiffs to recertify plaintiffs' class as well as arguments against certification of plaintiffs' class as now constituted and as proposed by plaintiffs. These arguments by defendants, and several unnamed members of the defendant class which this court has permitted to appear post-trial as "non-parties," [2] assert, *inter alia*, the inadequacy of named plaintiffs as class representatives, the lack of standing of named plaintiffs, and the non-commonality and atypicality of issues, claims and defenses.

Other threshold issues before me now are plaintiffs' request for recertification of the defendant class so as to comport with the applicable statutes of limitations, and the request of non-parties for decertification of the defendant class of contractors. As originally certified on March 13, 1972, that defendant class now consists of:

(a) all contractor associations which are, or may be, parties to a collective bargaining agreement with Local 542, International Union of Operating Engineers; and

(b) all contractor-employers who are subject to collective bargaining agreements with Local 542, International Union of Operating Engineers, and who, pursuant to such agreements, employ or will

---

[2] Although notice was provided out of an abundance of caution to protect the interests of fairness, no unnamed members sought to intervene in this action.

employ operating engineers referred to them by defendant Local 542.

There are an assortment of objections to certification of the defendant class including the claimed lack of personal jurisdiction over the unnamed class defendants, plaintiffs' lack of standing to assert claims against a defendant class and the asserted inappropriateness of defendant class certification under rule 23(b)(2), F.R. Civ.P.

For the reasons expressed below I hold that this action is maintainable as both a plaintiff and defendant class action, given the modifications as will be set forth. Furthermore, we find the defendant 542, JATC, and the defendant class and associations liable injunctively.

The issue of individual monetary recovery as well as the possible issue of class composition for purposes of damage relief should not now be decided but must await Stage II of this litigation in accordance with this court's bifurcation order. The issue of damages, if any, owed to the plaintiffs who initiated this suit or to any members of the purported class involves a separate evidentiary inquiry and a further legal analysis which would not be appropriate at this stage. The case was purposely bifurcated with all parties recognizing that in a variety of ways, upon a determination of liability, the discovery and trial of the damage issues could be expedited. It would be unnecessarily costly to have expanded and made this litigation even more protracted by considering the damage issues prior to the time when the correctness of my present findings and judgment on the liability issues have been fully subjected to final appellate review. After a final decree has been entered on the liability issues, I will grant a petition under 28 U.S.C. § 1292(b) certifying that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . ."

The facts of the instant case, as detailed below, demonstrate the complexity and subtletly of the interrelation-

ship of race, collective bargaining, craft unions, the employment process and that ultimate goal—real jobs which offer adequate hourly compensation and reasonably consistent pay checks through the year. Here there are many contradictions between pronounced policies and actual practices. Also there are some aspects of viral nepotism at its worst which had a disproportionate impact against blacks but also affected many whites. Some of the practices cannot be categorized as exclusively beneficial to all whites or as exclusively harmful to all blacks. Thus there has to be a careful weighing of the relative racial impacts of many practices and policies.

Here we have not been confronted with policies which announce publicly doctrines of racial exclusion or segregation as has occurred in some cases in the nation's past where such doctrines were announced either by legislative fiat or by proclaimed union or corporate policy. *See Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); Derrick A. Bell, Jr., *Race, Racism and American Law* (1973); Sterling D. Spero and Abram L. Harris, *The Black Worker* (1931, reprint ed. 1968); Herbert R. Northrup, *Organized Labor and the Negro* (1944); Robert C. Weaver, Negro Labor (1946); H.R. Northrup et al., *Negro Employment in Basic Industry* (1970); *Negro Employment in Finance* (1970), vol. 2; *Negro Employment in Public Utilities* (1970), vol. 3; *Negro Employment in Southern Industry* (1970), vol. 4; *Negro Employment in Land and Air Transportation* (1971), vol. 5. *See also* House Committee on Education and Labor, H.R.Rep. No. 718, 89th Cong. 1st sess. 1965; Herbert Hill, "Racial Inequality in Employment: The Patterns of Discrimination," THE ANNALS 357 (January 1965), pp. 30-47. In some instances some of the union members seemed concerned about increasing the opportunities for minority members; yet more often than not there was discrimination on a more sophisticated and

subtle level, even though the consequences could be almost as devastating as the most crude form of discrimination. At the critical level of viable jobs and equal opportunities, there were intentional and persistent efforts to exclude and discourage most of the minorities who, but for their race, would have been considered for entry into the union and for the more lucrative jobs.

Of course labor unions and the collective bargaining process are part of the American democracy. This process has improved dramatically the options of many. As Professor Archibald Cox has observed:

> The purpose and effect of every labor organization is to eliminate competition in the labor market. Chief Justice Taft's classic statement observed:
>
> > "[Labor unions] were organized out of the necessity of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers an opportunity to deal in equality with their employer."
>
> Each bricklayer's local seeks to control the supply of bricklayers' services available to contractors within its geographical jurisdiction. United Steelworkers of America controls the supply of labor available to United States Steel Corportion. In this sense every union is an avowed monopolist.

Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U.Pa.L.Rev. 252, 254 (1955) (footnote omitted).

Similarly, after quoting the above passage, Judge Aldisert has recently observed that:

> "the very essence of the labor movement, as protected by the national labor policy, hinges on labor's ability to seek monopoly in appropriate spheres . . . ."

Muko v. Southwestern Pennsylvania Builders and Construction Trades Council, No. 75-979, slip op. at 6 (3d Cir., August 11, 1978).

Yet it is clear that by the nation's civil rights laws there are limits to which labor's "avowed monopolistic" powers can be extended. Here the union (with the involvement of the contractors) has gone beyond the "appropriate spheres" of national labor policy and consequently has breached the overriding civil rights laws. Tragically, blacks and other minorities seeking entry most often were not aided but instead were deterred by willful manipulation of the collective bargaining process. Measured by the actual results, the antidiscriminatory proclamations have proven to have been mere rhetoric. During his campaign for election as business manager Robert Walsh's platform was "fair play." Yet, during his administration viable, equal job options were most often denied to minorities, and those relatively few minorities who received the option were seldom granted the more lucrative long term jobs.

Many explanations are proffered for this despicable state of affairs. Some assert that the racial disparities were caused merely by nepotism or union politics. Yet, while it may seem commendable for fathers to pass on to their sons and to their other relatives a heritage of lucrative employment, a union of elected officials all of one race cannot use their power to implant racially chauvinistic and discriminatory systems and union power politics create no special immunity from civil rights law enforcement. With intensity some employers urge that they agreed to the exclusive hiring hall system solely as a matter of economic survival at the end of a destructive ten week strike when the union would not compromise for any other hiring alternative. Yet economic pressures, however strong and harmful they might be, do not create

immunity for employers, at least not in this liability phase.

Finally, it must be emphasized that the economic stakes here are high. Members of the union could earn from $5.93 to $12.35 per hour. Some earned more than $30,000 and a few more than $40,000 per year. By now the average wage for the actively employed member is in excess of $15,000 per year. Despite its monopolistic powers, no one union is required to open its doors fully to admit everyone who applies—for to do so would reduce the financial options of the more senior union members. Nevertheless, a union cannot manipulate the collective bargaining system in claiming that it is restricting entry options to protect the general economic interest of its members while at the same time opening the back doors manipulatively to permit its special friends, relatives and others to enter through a racially discriminatory system. In Local 542, there was extraordinary manipulation of the process by many individuals who maneuvered the system for their relatives or their special friends—most of whom were white. Black veterans who had served their country with honor and distinction by proficiently operating engineering equipment during the Vietnam War and World War II were dissuaded persistently from applying to the union. Yet the young sons of the business manager Robert Walsh could enter the union with ease: one of Walsh's sons entered at the age of 18 and by his second year was earning more than $43,000 per year. The son of the hiring hall dispatcher at the age of 18 entered without any prior experience as an operating engineer's apprentice or oiler and in violation of the union rules. This pattern of easy, inappropriate entry and assignment to better jobs was repeated time and time again for the special friends of the union. *See generally* Plaintiffs' Schedule On Union Nepotism, Volumes, I, II and III. Union officials maneuvered the system so that their friends and relatives achieved entry and better jobs while those on the outside of the

union power structure—including both blacks and whites —were deterred, delayed or refused union membership and access to the hiring hall. Though a relatively few blacks benefited, the totality of the union's conduct demonstrates that it sought to aid a selfish cause in part by a deliberate policy of resistance to equal minority participation as is shown by the deceptions contained in the defendants' 1968 Affirmative Action Agreement, discussed below, and by a series of other specific acts which precluded minorities, mostly blacks, from getting the options they otherwise might have had.

II. FINDINGS

A. *The Hiring System*

An examination of the facts in this case must begin with an elaboration upon the structure and operation of Local 542.

In 1961 Local 542 concluded a bargaining agreement with the defendants Contractors Association of Eastern Pennsylvania ("CAEP") and General Building Contractors Association ("GBCA") according to which 542 became the exclusive mechanism through which operating engineers were to be employed. Another association, the Delaware Construction Association, had agreed to the exclusive hiring hall earlier in 1961. Prior to 1961 the negotiating trade associations had resisted efforts to establish an exclusive hiring hall. Given the reality of a ten week strike by 542 members and the prospect of serious adverse economic consequences from a continuing strike, the CAEP and GBCA agreed to the union's proposal.[3]

The hiring hall referral system thus formulated on paper is essentially the same one as is now embodied in

---

[3] This agreement was negotiated by the CAEP and GBCA on behalf of its members. Not all employers were members; however, the defendant class is limited to all employers who have adhered to the agreement.

the collective bargaining agreement. (I am not suggesting that the hiring hall in fact operated as it was supposed to or that hiring classifications were uniformly honored.) By the terms of the hiring hall agreement 542 is to maintain lists of operating engineers, or would-be engineers, in four basic categories ("groups") which are defined by measuring hours of recent construction experience. When an employer has need of an operating engineer he will notify 542 and within 24 hours should receive a referral. The key provisions of the Bargaining Agreement ("agreement") are as follows: [4]

GROUP I

GROUP I shall consist of all those applicants who are under Group I and who have qualified for same as of May 1, 1963, and all applicants who have worked within the geographical area of the Eastern half of the State of Pennsylvania and the State of Delaware five thousand (5,000) hours within the past eight (8) years; or two thousand five hundred (2,500) hours for the past three (3) years. All applicants shall be entitled to priority under Group I who would have qualified for any of the foregoing classifications were it not for absence due to military service, or service as a Union official, or disability within the provisions of Local 542 Operating Engineers Welfare Plan, . . .

GROUP I-A

[This classification added in 1968 by amendment]

GROUP 1-A—Shall be reserved for such jobs that are not physically demanding. This normally would be equipment such as compressors, welding machines, generators, heaters, etc. But recognizing that such or similar jobs may be physically demanding in cer-

[4] The basic terms appear consistently in the bargaining agreements having a bearing on this case.

tain instances, the Employer will discuss the details of such or similar jobs with the Union in order to place the job in the proper category.

Registration on Group I-A out-of-work list will be voluntary and will be restricted to those who are fifty (50) years of age or over, and who have been continuously in Group I for a period of fifteen (15) years of more, or those who are physically handicapped and who are unable to pursue their normal occupational classification. . . .

GROUP II

GROUP II shall consist of all those applicants who qualify for any of the following categories: All applicants who have worked within the geographical area of the Eastern half of the State of Pennsylvania and the State of Delaware twenty-five hundred (2,500) hours within the past twelve (12) years; four hundred (400) hours per year during any three of the past five years; or four hundred (400) hours during the past year.

GROUP III

GROUP III shall consist of all other applicants for employment. [Article II, § 2(e).]

According to Article II, § 2(f), the union is to maintain a separate list for each group. One's position on the list depends on the date of his registration certifying that he is available for work. Under section *g* the contract provides that the Group I list is to have priority. After Group I listees have been placed, Groups I-A, II, and III are to be used. The agreement provides one basic exception from the requirement to refer according to date of registration and that is with respect to jobs requiring special skills. If an employer needs a specially skilled person, such as a bulldozer operator or a crane operator, the hiring hall is empowered to select such a

person even if it means bypassing persons on the list ahead of him not possessing the requisite skills.[5]

Although the hiring hall constitutes the exclusive referral system, each employer has the right, based on his determination of competency, to refuse to employ one who is referred. If an employer makes such a refusal he may receive another referral which in turn he can accept or refuse. Under Art. II, § d, however, selection for referral shall be made without discrimination.[6]

As originally constituted, for all purposes of this suit, the divisions of 542 consisted of the parent body, the A and B branches, and the C and D branches. A Registered Apprenticeship Program was also instituted in 1966. The parent body was to consist of experienced operating engineers. The A branch members were to be unskilled oilers, beginners in the trade; and B branch members were to be the operators of earth-moving equipment. The C branch members were to work in yards and shops and D branch members were surveyors: neither of these two branches were directly subject to the hiring

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[5] Other restrictions pertaining to referral are the three refusal rule and the 90 day no-recall rule. An operating engineer who refuses without excuse an offer of employment three consecutive times is to be placed at the bottom of his out-of-work list. No employer is to recall outside the referral system after 90 days of separation.

[6] Prior to May 1, 1971, Art. II, § 2(d), expressly mentioned only discrimination on grounds of non-membership in the union. The provision read as follows:

> (d) The selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way, affected by, Union membership, by-laws, regulations, constitutional provisions or any other aspects or obligation of Union membership, policies or requirements, except as outlined in this Agreement.

After May 1, 1971, a provision was added:

> No employee, or applicant for employment, shall be discriminated against by reason of race, religion, color, or national origin. [Art. II, § 1.]

hall system negotiated and agreed to by the contractor associations. Registered Apprentice (RA) entrants were to include those novices, frequently doing unskilled work as oilers of machinery, who seek entry into the union's construction branches. This entry could be achieved upon attaining the status of journeyman operator.

Until 1972, A, B, or C branch members could not run for or hold union office, and only parent body men [7] were eligible for appointment as master mechanics, a supervisory position usually paying relatively high rates. In 1973, however, the A and B branches were eliminated. Their members were transferred to the parent body. The D branch was supposedly eliminated by the end of 1975; however, according to one union exhibit its existence continued at least until January 2, 1976.[8] At the present time the parent body, C branch and the RA program are the only divisions of 542.

The registrant program is a classification by which an operating engineer not eligible for union membership maintains his referral status. This classification was created in 1965 and was initially divided into A (inexperienced) and B (experienced) registrants. That distinction was theoretically phased out after 1968 because the A registrants were detracting from the work available to registered apprentices. Since 1970 a field admission test and a written test have been required of applicants for registrant status. Registrants can progress to Group I status without seeking to join the union. (No evidence has been presented concerning the precise number of registrants who might not seek union membership status.) After achieving 2500 hours, however, a registrant can, under the contract, be admitted into the union upon application.

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[7] "Men" is used here because the record establishes that 542 has never had women members of the union.

[8] U-261.

Formal entry into the union may also be achieved, according to procedure established by Local 542, as detailed below, through union organization of a workforce of an employer not previously subject to a bargaining agreement with Local 542. Prior to January 1, 1975, construction employees who were organized might enter either A or B branch. Since January 1, 1975 when these branches were abolished, all such employees are to enter into the parent body directly. Yard and shop workers who are organized are to enter C branch and surveyors are to enter the D branch. Intra-union transfers from A and B branches to the parent branch after four and three years respectively are and have been available. Transfers out of C branch have occurred either without restriction or after one year of experience in C branch.[9]

Geographically, Local 542 encompasses Delaware and Eastern Pennsylvania. Because of the enormous size of this jurisdiction, the Local is divided into five districts, each with its own referral lists and hiring hall but all ultimately under one administration. It appears that the normal but not necessarily the absolute practice is for the work site hiring hall to make referrals based on its own district's listings.

The estimated 1400 contractors who have recently engaged in operating engineering work within Local 542's wide range may vary considerably in size. Relatively few are members of the defendant associations.

CAEP's active members numbered only 109 during the period 1965-1971, 88 during 1972-73, and 83 during 1974-75. Defendant GBCA listed its active membership at 104 for the 1965-1971 period, 99 for 1972-73, and 83 and 74 for 1974 and 1975, respectively. Defendant United Contractors Association ("UCA") had 28 active members at the time suit was filed in 1972, and between

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[9] Transfers from other locals can also be achieved once a clearance card is obtained.

1972-75 lost half of that membership. The remaining defendant association, Pennsylvania Excavating Contractors Association ("PECA"), dissolved in 1972; the record is silent as to its membership. Notably, both UCA and PECA have consistently delegated their negotiating responsibility to CAEP.

As a result of contracts entered into pursuant to negotiations with CAEP and GBCA in 1961 and subsequent negotiations with contractor associations, all participating contractors have passed on the direct managerial control of their application process to the hiring hall operated by Local 542. The contractors did not, however, relinquish power to affect the union's operation of the hiring hall, for the contract terms remained fully capable of enforcement in the event they were violated by those operating the hiring hall and the contract instituted a grievance procedure by which an appellate tribunal consisting of an "Employer Representative, a Union Representative and an Impartial Chairman appointed jointly by the Employer and Union . . ." would decide whether a complaining job applicant was aggrieved "with respect to the functioning of [the] hiring agreement." Article II, § 2(m). Although a vast majority of the employers are not and have not been active members of the defendant associations, the negotiations conducted by those bodies have established a standard to which the unaffiliated contractors may conform.

The hiring hall system is on its face neutral and purports to create a bona fide seniority system. Plaintiffs' allegations of discrimination are not directed against the hiring hall system per se but against the union's alleged intentional refusal to follow their own hiring hall rules, thus causing intentional discrimination against and a discriminatory adverse impact on minorities. Plaintiffs also allege discrimination particularly in admission into the union and admission to the job referral process. This allegation, although not attacking the hiring hall procedures set forth in the contract, does attack practices

which would render the use of the hiring hall intentionally and otherwise discriminatory and contradict its bona fide seniority appearance. The foundation of this case rests on the statistical, documentary and testimonial evidence of discriminatory departures from and applications of the union hiring hall system.

B. *The Philadelphia Plan*

On September 24, 1965, shortly after Title VII went into effect, President Lyndon Johnson issued Executive Order 11,246 [10] prohibiting discrimination by contractors with federal contracts in excess of $10,000 and requiring affirmative action to ensure non-discrimination. The Department of Labor and the Office of Federal Contract Compliance ("OFCC") have principal responsibility for the enforcement of this Order.

Since much major construction work is done with at least partial federal funding, the federal government expressed its concern that the Order be complied with in the construction industry in the Philadelphia area. Toward the end of 1966 Bennett Stalvey, Director of the Regional Philadelphia Office of the OFCC, met with officials of Local 542 and later with officials of the CAEP and GBCA, advising them that it was the function of his office to see that the Order was complied with.

At this point, there was a clear disagreement between the federal government (OFCC), which wanted a higher percentage of minority individuals on construction jobs, and the construction industry, which wanted to use its traditional methods of employment. In the Philadelphia area (Philadelphia, Bucks, Delaware, Chester and Montgomery Counties) this matter took on added signficance. Bennett Stalvey, in the fall of 1967, developed what was known as the "Philadelphia (Pre-Award) Plan," under which the requirements of the Executive Order would be implemented. A low bidder on a construction project involving certain levels of federal funding would be

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[10] 30 Fed. Reg. 12819.

obliged by the OFCC to maintain a specific level of minority representation in his construction workforce.[11] The contractors, however, refused to make the specific commitments and hence in the spring of 1968 federal funds were withheld. Although Stalvey testified that there were several instances in which funds were withheld, the record specifically reveals only one low-bidder contractor-employer who was to use operating engineers out of 542's hiring hall and from whom funds were withheld—Kiewit Sons Company of Omaha, Nebraska, a company which was to undertake a major highway construction project in Pennsylvania. Kiewit was not at that time a member of any regional contractor association, although it had been a member of CAEP by the end of 1967. Stalvey testified, and I find, that a total of at least $30 million in funds was withheld from highway construction programs through the spring of 1968.

A program was then developed which would accommodate the union in serving as an exclusive hiring hall and at the same time assure a substantial minority participation in the operating engineer trade. After a June, 1968, meeting in Washington, D.C., among officials of 542, their international representatives and OFCC officials, an "Affirmative Action Program" was executed on July 17, 1968. This program, as explained by Howard Minckler, a CAEP official, specifically included language urged by the contractor associations expressly making it in lieu of any other affirmative action plan, *i.e.*, the Philadelphia Plan. Local 542, UCA, CAEP, and PECA were the original parties to this agreement, although by August, 1968, GBCA became an additional party. On the first page the agreement states:

> The parties to this agreement have *made a detailed analysis of employment of minority group workers*

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[11] The Secretary of Highways of the State of Pennsylvania objected to the demand for a "manning table" asserting, *inter alia*, that such a demand contravened civil rights law. This issue is not now before us.

> in the classifications covered by this agreement and have determined that, in the area governed by this agreement, approximately 650 members of Local 542 are minority group members out of a total membership of 5400. [Emphasis added.]

The affirmative action thrust of this program was to establish an apprenticeship program into which minority members could be recruited and trained. In addition, there was to be a program for retraining journeymen, particularly minority journeymen. The federal government accordingly approved the program in lieu of the Philadelphia Plan. Thus federal monies were released and no money has since been withheld. The statement that 650 (12%) of 5400 members of Local 542 were minority members was viewed by defendants to be an important factor in obtaining federal approval of the substitute Affirmative Act Program and thereby eliminating compliance with more stringent federal minority manpower requirements. The "detailed analysis of employment of minority group workers" by Local 542, CAEP, UCA, PECA and eventually GBCA was, however, grossly exaggerated and totally in error.

In order to appreciate the significance of the overstatement of minority members in 542, it seems useful to outline the history of such inaccuracies. In the early 1960s, Robert Walsh, Business Manager of Local 542, told the Philadelphia Human Relations Commission that by his guess the figure was 500 of 5000. In 1966 Local 542 officials Walsh, Cahill and Ciavaglia informed Bennett Stalvey that the number was 800-900 of 5000. Later Minckler in a meeting with Stalvey stated that the number was "very large." Based on the figures stated to Stalvey, the October 27, 1967 copy of the revised Operational (Philadelphia) Plan lists the minority composition as stated by the union at a possible 800-900 of 5000. In a 1967 report to the EEOC the union estimated a figure of 650 of 5000 stating, inaccurately, that most of its members "including Negroes and Spanish Americans have

permanent employment" and therefore do not use the referral system. In 1968, Robert Emrick, formerly an official in the union but at the time coordinator of the Registered Apprenticeship program, told EEOC investigator James Nunes that his estimate was 600 blacks in District I and 50 more in other districts. In that same year the union wrote to Robert Bartlett, Pennsylvania Secretary of Highways, that 11-12% of the union membership were minority group members. This served in part as the basis for Bartlett's objection to the withholding of funds in 1968. See note 11 *supra*.

Finally, by 1969, the stated level of minority representation began to recede into reality. Stalvey was told in a February 18, 1969 meeting with union officials Robert Walsh, Homer Dawson, Joseph O'Donoghue and their attorney, Martin Vigderman, that there were 400 minority members among a total of 6000 members.[12] By December of 1970, the union had ascertained that the number of minority members as of January 1, 1970 was 259 of a total membership of 6128. This number was reported to the EEOC by a document dated December 31, 1970, and signed by Robert Walsh and was referred to in correspondence to the OFCC by Homer Dawson, local union president, in December of 1971.[13]

It is not acceptable to describe the repeated gross inaccuracies as merely incorrect guesses. Those defendants who signed the Affirmative Action Program agreement stated that the figure was arrived at after a "*detailed analysis.*" It obviously was not. Furthermore,

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[12] In a letter from Martin Vigderman, Esq., to Bennett Stalvey, dated January 8, 1969, the number of minority members was stated to be about 350 of a total of about 5500 members.

[13] Homes Dawson, in a letter to John L. Wilks of the OFCC dated December 6, 1971, stated that in a 1968 report to the EEOC the union expressed the result of a questionnaire on minority membership. The union reported 193 minority members of 2845 responses. A total of 6000 questionnaires were stated to have been mailed out.

Mr. Ciavaglia, the union official in charge of the hiring hall, with the assistance of Mary Kelly, a union employee, undertook a study in 1969 or 1970 based on records and their own knowledge of the membership, and concluded that there were an estimated 200 blacks in District I of Local 542. The ultimate unionwide count of 259 minority members as of 1970 was achieved by a similar method, one which was available throughout the period during which the inaccuracy was perpetuated, *i.e.*, through "personal knowledge and identification by the business agents and officials of the Union and by contacting the last known employer when not known by the agents." In addition to these distortions, 542 failed to include in their semi-annual reports to the OFCC information on where and in what capacity minority operating engineers were employed although such data was required by the Affirmative Action Program Agreement.

While it is conceivable that in one instance the union could have inadvertently made a significant error in overestimating the number of minorities in the union, it is incredible that errors of this magnitude could have occurred consistently by any mere coincidence. *I find, and the record permits no other plausible inference, that the repeated overestimation of the number of minority individuals in the union, the failure to file complete semi-annual OFCC reports with the prerequisite data, and the other related activities of the union on this issue of the "Affirmative Action Program" were part of a deliberate scheme of Local 542 to deny to the federal government accurate information on the percentage of minority individuals in 542. This scheme was part of an effort to have federal funds inappropriately released while at the same time permitting 542 to keep the minority representation in the union at a far lesser level then it otherwise would have been if the Philadelphia Plan had been applied. Only a finding of discriminatory intent can explain this subterfuge. The Philadelphia Plan would have resulted in a higher number of minority group*

members in the union and in the related industry. I find further that the Philadelphia Plan would have been adopted by the defendants if the fraud, deception and scheme of Local 542 had not been pursued by the willful presentation of substantial overestimates of the number of minorities in the union.

Any argument that, because the union alone had primary access to the membership data, the contracting associations CAEP, UCA, PECA, and GBCA were not at least reckless participants in this scheme, I find to be devoid of merit and patently incredible. When these same contractors sought the release of the 30 million dollars they showed no hesitation in signing the statement that they "made a detailed analysis of minority group workers . . . ." At the time of this certification, there was no real suggestion that any of the signatory contractor associations had any doubt about the accuracy of the data or had merely limited knowledge of it; instead, they endorsed it. In this respect their posture is like that of an accounting firm which has certified that it has counted petty cash monies or has verified bank statement deposit records when, in actuality, it has done neither. In the instant situation, the record reveals a total absence of concern on their part regarding the accuracy of their representation to the federal government in seeking the immediate release of at least 30 million dollars and doubtless the release of millions more to follow. The prospect of deriving such an immediate and substantial financial benefit from the federal coffers allowed them to become willing parties to the scheme by capriciously certifying "facts" in anticipation of the government's reliance on them: Having sought to enrich their members with substantial profits, it is now too late to cry innocence and cast the blame elsewhere. These were no innocent prognosticators who were misled by the union's scheme to give inaccurate information. Under these circumstances, I find that these signatory defendant associations are consequently estopped from repudiat-

ing their certification after their members have had the opportunity to compete for and after many have received the released funds.

C. *The Benjamin Franklin Programs I and II*

In 1968 James Longacre, Executive Director of the Pennsylvania State Council of Operating Engineers (a private organization), formulated a six-month training program consisting of on-the-job instruction and classroom instruction for 100 hard core unemployed males from eastern and western Pennsylvania. While there were both white and black trainees, the majority of the members were minority individuals. An agreement was reached between the Council and the Pennsylvania Department of Labor to implement this plan. Local 542 had some measure of responsibility for final selection of the participants from eastern Pennsylvania even though (1) it was not asked to contribute to the program's funding, which came from the federal government ($231,135) and the Commonwealth of Pennsylvania ($542,884.27), and (2) the Council of Operating Engineers and the Pennsylvania Bureau of Employment Security were fundamentally responsible for recruitment. Some equipment was donated by contractors, including Glasgow, Inc., but most was paid for in rentals from the program's funding. None of the associations or contractors were parties to the agreement or responsible for the Benjamin Franklin I (BFI) endeavor and none received federal funds for the administration of the program.

The recruitment and selection activities by 542 were conducted through the JATC and particularly by George "Al" Holland, a black operating engineer who was a union business agent. Two minority applicants, Ronald Richardson and Howard Williams testified that they were told by Holland at the recruitment stage that upon successful completion of the BF program they would

obtain steady work. This was repeated during training and at graduation exercises along with the assurances of union membership and journeyman's pay. Even a graduation handout stated that graduates would receive highway construction jobs.

Of the 122 original trainees, 81 graduated from BF I. Fifty eight of these were black, 23 white; of this group 37 blacks and 7 whites were from eastern Pennsylvania. None of these graduates was given any credit for hours spent in training. This is a matter of no small significance since the number of hours of experience, described earlier, is supposed to enhance placement in the hiring hall system. These graduates were placed on the Group III (lowest priority) out of work list. Although the director of the Benjamin Franklin Program, Mr. Nygard, testified that the graduates needed "follow through" (on-the-job assistance), none was provided. Mr. Walsh testified that it was his expectation that the graduates would work in yards, mills, or trucking companies but not in construction. As will be detailed below, many graduates received little work opportunity.

Toward the close of 1969, a Benjamin Franklin II (BF II) program was agreed upon, again at the instance of Mr. Longacre and with the approval of the Pennsylvania Department of Labor. The same format was used for recruitment and selection except that a tenth grade education qualification and screening tests were required of entrants and the Pennsylvania highway contractors were themselves required to contribute $80,000 statewide in cash or equipment as a condition to continued eligibility for bidding. The contractors formed Construction Training, Inc. in order to make the financial arrangements. Each contractor was to contribute to Construction Training, Inc. a base amount of $200 plus a rate of $.04 for each hour of time worked by an operating engineer or apprentice between March and October 30, 1970.

As with the BF I program the defendants had no part in formulation of BF II. George Holland did, however, have major responsibility in the process by which the union recruited applicants. Holland made statements to John Henry Owes that he would receive 2500 hours credit, a parent body book, and future on-the-job assistance if he graduated. Holland also made similar statements to Thomas Taylor, particularly that he would become a journeyman and earn $300 to $400 per week.[14]

The training for BF II took place at the same location as the BF I training, Resica Falls, Monroe County, Pennsylvania. Of the 65 selected, 56 were graduated; of these, 46 were black, 24 from eastern Pennsylvania. Once again none of the graduates were given time credit, no one received a journeyman's status, and after graduation only a few minority graduates accumulated a significant number of hours. In BF II, as in BF I, the associations, contractors and unions did not receive any funding.

The immediate net result of the Benjamin Franklin Programs was to increase the number and percentage of minority registrants in Group III status. I find that many of the BF trainees had been led by the union to believe they would be put in Group I rather than in Group III status and thus have the advantage of better job opportunity. In the years to follow that training, many though not all would fail to achieve the hours necessary to become members of the union or to enter Group II or Group I. The Benjamin Franklin Programs figure heavily in the present action because all of the named plaintiffs are BF graduates.[15]

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[14] The union never called Holland to testify to refute those claims even though he was working as an operating engineer during most of the time on a construction project in this very courthouse and even though, on occasion, he was a spectator at the trial.

[15] The union, associations and contractors were also obligated as a result of their "Affirmative Action Program" to upgrade their

D. *Procedural History* [16]

Having outlined briefly the hiring hall system of 542 and having discussed some of the important circumstances underlying this suit, particularly the Benjamin Franklin training programs and the participation of defendants Local 542 and contractor associations in a program substituting for the Philadelphia Plan, attention may meaningfully be directed to the procedural history of this case.

The first major legal challenges to the alleged discrimination began with two charges filed before the EEOC, one by an EEOC Commissioner Vincent T. Ximines on July 29, 1968, and one by three BF I graduates, Raymond Williams, Willie McKay and Donald Muchison, on June 17, 1969. EEOC investigator James Nunes investigated both complaints. Service of Ximines' charge upon Local 542 was made on October 3, 1968 and service of Williams' charge was received on November 28, 1969. Ximines' charge was directed to the breadth of 542's procedures:

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training opportunities with an emphasis on minority participation. Although the "Affirmative Action Program" succeeded in diverting application of the Philadelphia Plan, it did not, even at this basic level, provide the assured attention to minority upgrading. Operation Stepping Stone, an upgrading project pursuant to the "Affirmative Action Program," gave minimal attention to the purpose of minority upgrading. No special efforts were made to notify minority operators or to describe the program as one which was to emphasize upgrading among minorities. As to four minority applicants to the program who did not participate, the record reveals no explanation. A total of six minorities out of 96 participants in the two-session operation spent at least some upgrading time. Only three minority individuals out of 89 completed the program.

[16] Although certain exhibits containing letters, findings and decisions pertinent to the administrative disposition of this case before the EEOC were excluded for substantive purposes, they must be considered purely in addressing the issue of the existence of and the extent of jurisdiction. These legal issues will be discussed below.

(a) Respondent discriminates against Negroes in referrals for jobs.

(b) Respondent discriminates against Negroes by limiting and classifying its membership in a manner which deprives Negroes of employment opportunities.

(c) Respondent discriminantly fails or refuses to admit Negroes to apprenticeship programs.

(d) By these and other acts, Respondent has discriminated and continues to discriminate against Negroes because of their race in violation of the provisions of Sections 703(c) and (d) of the Act.

The pro se charges by Williams, McKay and Muchison are identical to one another. They allege discrimination in the union's referral practices:

> I was recruited into the training program by a representative of the International Union of Operating Engineers, Local No. 542 and upon completion of the training program I was promised employment by the Union. The training program under the sponsorship of the Union ran for a period of six (6) months. During this time I was trained to operate the following heavy equipment: Bulldozers, Graders, Front End Loaders, Back Hoes, Post Hole Drills, Core Drills, Scrapers, etc. I was graduated as a qualified operator on the above equipment. Since my graduation two weeks ago I have been to the Union Hall every day to be referred, with no [undecipherable word] results. I feel that I am being discriminated against because of my race (Negro) and for no other reason.

On August 30, 1971, the Philadelphia District Director of the EEOC, Ralph A. Allen, advised Local 542 in separate letters of the decisions of the EEOC that reasonable cause existed to believe (1) that Ximines' charge was true and (2) that the charges of Williams, McKay, and Muchison were true. The three claimants, in the decision in their case, were deemed entitled to receive the

EEOC's decision dated August 6, 1971, on the Ximines charge. The letter of decision on their own case stated that, as members of the class harmed by the discrimination alleged by Ximines, the three individuals were entitled to such notice:

> The Companion case . . . concerns a charge lodged against Respondent by an EEOC Commissioner. Pursuant to our Procedural Regulations, 29 C.F.R. 1601.25b (June 18, 1970), 35 FR 10005, Charging Parties will be entitled to receive copies of our decision in [the companion case] both because they are currently aggrieved by practices found to be unlawful in that decision, and because they were members of the class of potential Negro members which was aggrieved by several of Respondent's unlawful employment practices at the time the Commissioner's charge was filed.

Right to sue letters dated October 14, 1971, were sent to Williams and McKay.[17] Within 30 days thereafter, on November 8, they and the other named plaintiffs in this suit filed their class action complaint with the district court. On January 3, 1972, a class of plaintiffs and defendants was certified, as described above.

During the discovery stage which followed there was an unexpected and very unfortunate development in retaliation for the filing of plaintiffs' suit. On June 19, 1972, Marion Eaddy and John Dent, both named plaintiffs, were attacked by white operating engineers in the union hiring hall offices. Dent's testimony, which I credited in my previous opinion at 347 F.Supp. 268, 275-76 (E.D.Pa. 1972), *aff'd*, No. 72-1901 (3d Cir., May 21, 1973), was particularly graphic. Marion Eaddy had been hit over the head from behind with a chair. Two men then continued punching and kicking him as he lay on the floor. Dent pulled one man away from Eaddy

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[17] The record does not make reference to the sending of a right to sue letter to Muchison.

and shouted for help from the others in the hiring hall who included the union's business agent, Mr. Ciavaglia, his assistant, a C branch agent and twelve to fifteen union members. Dent himself was then struck over the head with a chair by a white operating engineer. The police were never called. The victims were not forewarned or aided by those witnessing the occurrence. Although Ciavaglia testified that he did not know the attackers, one of them had been in his office just a few minutes before.

On the following day the violence increased. Four or five pickup trucks in each of which were several white men, some of whom Dent recognized as operating engineers, came to the hiring hall *en masse* shortly after working hours. Despite the presence of a policeman, Dent, Eaddy and Cleveland Allen were beaten by groups of white operating engineers in front of the hiring hall. 347 F.Supp. at 276-77.

After an extensive examination of the facts and law this court entered an order enjoining *pendente lite* Local 542 and all those acting in concert with or on behalf of Local 542 from interfering in any way with or retaliating for plaintiffs' exercise of their federal statutory and constitutional rights to institute their employment discrimination action.

Following four years of discovery, I entered an order bifurcating the trial into two stages: the first on the issue of liability and the second, if liability was found, on the issues pertinent to recovery of damages.

E. *The Delays and Contempt Issues Involving Abraham Freedman, Esquire*

During the course of the trial which began on January 19, 1976 and continued through June 28, 1977, there were two other unusual occurrences deserving mention. Local 542's counsel, Abraham Freedman, Esquire, was twice cited for criminal contempt for his courtroom con-

duct. 73 F.R.D. 551 (E.D.Pa. 1976), *aff'd*, 552 F.2d 498 (3d Cir.) (affirming both criminal contempt orders), *cert. denied*, 434 U.S. 822, 98 S.Ct. 67, 54 L.Ed.2d 79 (1977); 73 F.R.D. 544 (E.D.Pa. 1976) (denial of motion for stay of action pending Freedman's appeal of first criminal contempt order). The first contempt order followed a lengthy and undirected reading by Mr. Freedman of Bennett Stalvey's deposition during his cross-examination. After four transcript pages of such unfocused reading, plaintiff's objection was sustained. Mr. Freedman responded by objecting to the court's ruling. He stated his intention further to state his ground for objection. He was ordered not to do so with the assurance that he would be the beneficiary of all possible grounds. After numerous repetitions of the order, 73 F.R.D. at 548-50 (Appendix A), Mr. Freeman, wilfully persistent in his course, was held to be in contempt. Freeman received a thirty-day sentence which has since been modified to a $500 fine upon Freedman's motion for re-sentencing.

The second contempt order was a result of Mr. Freedman's calculated dilatory tactic to continue reading from Samuel Long's work record (in evidence as an exhibit) despite an order to cease such reading. 73 F.R.D. 551 (E.D.Pa. 1976). For this refusal Mr. Freeman was fined in the amount of $500.

From the very beginning of this lawsuit Mr. Freedman's tactics of delay and reprehensible conduct were wilfully designed and executed with the intent to obstruct and preclude a proper judicial determination of the real facts of the case. It is my judgment that he sought to subvert this intensely controversial matter to a mistrial so that years of investigation and discovery would have to begin again. Although his conduct was as reprehensible and as irresponsible as any I have seen during thirteen years as a trial judge, nevertheless, with patience and hopefully discernment, I have tried

to disassociate those tactics from the essential fact finding process here.

Fortunately, for all the litigants including his clients, Abraham Freedman was not successful in aborting the trial process; however, he did succeed in making most difficult the presentation of those issues which would have been easy to discern from a fact-finding standpoint and which could have been ruled on and adjudicated promptly. As to the more complex matters in the case, he persistently tried to make it impossible to comprehend their nuances and to preclude any rational presentation of the case. By reason of this daily persistent level of counsel irresponsibility, discovery, trial and adjudication have extended far beyond any reasonable time span which any case would warrant—even one involving a most intense vigorously litigated controversy.

Perhaps the tone of the trial can be best conveyed by the opinion of the Court of Appeals on the two contempt citations. *Commonwealth of Pennsylvania v. Local Union 542*, 552 F.2d 498 (3d Cir.), *cert. denied*, 434 U.S. 822, 98 S.Ct. 67, 54 L.Ed.2d 79 (1977). After evaluating Mr. Freedman's conduct, the Court of Appeals reviewed cases where similar conduct of non-lawyers was held to be inexcusable and then the Court noted:

> If non-lawyer Seale's defiance of a judge's order was inexcusable, how much more so should be the conduct of appellant Freedman, a seasoned trial lawyer. We agree with the Seventh Circuit, and hold that a trial attorney's belief that certain action is necessary to protect the record for appellate review does not excuse his deliberate defiance of the trial judge's explicit and repeated orders. The phrase "preserving the record for appeal" is not a talisman that absolves a lawyer from his usual obligation to comply with a trial judge's direct orders.

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Freedman's conduct was an affront to the trial judge's authority to control the proceedings in his own courtroom. An attorney who, in deliberate disregard of seven direct and explicit orders by the trial judge, pursues a course that he determines to be in the best interests of his client, offends the dignity and authority of the court and thereby obstructs the administration of justice. *United States v. Seale*, 461 F.2d 345, 371 (7th Cir. 1972). To hold otherwise would be to strip trial judges of their power to supervise the proceedings before them, and to clothe counsel with the authority to conduct trials in whatever manner they deem appropriate. Furthermore, we note that Freedman's conduct was obstructive because it resulted in a wholly unnecessary and not insignificant delay of the trial. For this reason, too, we conclude that his conduct arose to the required level of disruptiveness.

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Freedman's action was intentional, constituted misbehavior which caused an actual obstruction of the administration of justice, and occurred within the presence of the court.

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Freedman concedes that his conduct did not vilify the judge, and we cannot agree that the judge's comments demonstrate a bias against Freedman. The judge's description of appellant's conduct was neither acid nor sarcastic; it was simply accurate. The trial judge exhibited patience and restraint, and did his utmost to preserve order and decorum; he did not engage in wrangling or bickering, and used the summary contempt power only as a last resort . . . . Appellant [Abraham Freedman] mistakes judicial disapproval for personal pique. A judge who objectively expresses his antipathy toward contumacious conduct does not thereby disqualify himself from adjudicating the contempt under Rule

42(a). Under the circumstances of this case, we see no need for another proceeding to adjudicate what one judge has already witnessed. Summary disposition, we hold, was appropriate.

After the contempt citations had been sustained and on the last day for modification of his thirty day sentence, he filed a petition requesting that he not be sent to jail—even though the sentence had been affirmed and no further judicial relief seemed available. I modified the prison sentence by vacating the imprisonment and imposing a fine of only $500. This was done not because there were any fundamental mitigating factors but solely because if, at his present age of more than three score and ten, he has never learned or has now lost totally the recognition of the standards of permissible conduct for lawyers, then 30 days in jail would not be a true deterrent for the future. Thus the jail sentence was not eliminated because of any view that it was ever unfair, for I am still confident that Mr. Freedman's conduct was as inexcusable as it was so often disgraceful.

F. *The Named Plaintiffs as of Certification*

As has been noted all twelve of the named plaintiffs are graduates of either Benjamin Franklin I or II. Because of the importance of the characteristics of these named plaintiffs in determining whether they satisfy the class action requirements and rule 23(a), the plaintiffs will be described with reference to some basic features.

At the time of the certification, on March 13, 1972, one of the named plaintiffs (Marion Eaddy) was a listee in Group I, five were in Group II (Randolph Hughes, William Bostic, Ronald Richardson, Ronald Crawford, Willie Frank Gilchrist) and the remaining six in Group III (Raymond Williams, William McKay, Arel Brownlee, Kenneth Howard, Alpha Christmas, Clarence Winder).

One, Marion Eaddy, a graduate of BF I, did become a member of Local 542's parent body. Two of the named plaintiffs, Randolph Hughes and Alpha Christmas, also BF I graduates, were applicants to the Joint Apprenticeship Training Program, although neither had received a final disposition of his application. The JATC files of Hughes and Christmas indicate no disposition but simply make reference to the Benjamin Franklin program. All plaintiffs were alleged to have been victims of the referral practices and practices relating to admission to Local 542 and discriminatory advancement in their profession.

The hours worked by named plaintiffs range from none at all to over 2500 in the period between their BF graduation and class certification. Three, Raymond Williams, William McKay and Clarence Winder never received registrant books, the first and lowest step in attaining entry to the union.

Although it is clear that the Group III plaintiffs are different from the Group II and Group I plaintiffs in terms of their supposed priority in referrals, I find there is no conflict between such plaintiffs for purposes of trying the legal issues of this suit. Plaintiffs are not attacking the hiring hall system as constituted but rather are attacking practices which, while forming no part of the hiring hall system's stated foundation, nevertheless have a profound impact on its operation.

G. *Statistical Evidence*

An important part of plaintiffs' case lies in its proof of discrimination in membership in Local 542 and its proof of discrimination in hours and wages of minority union members. Plaintiffs' proof on both issues is based in part on a statistical probability analysis. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). For the sake of orderliness we will take the statistical proof of membership discrimination first.

Plaintiffs' expert, Dr. Bernard Siskin, is an Associate Professor at Temple University and Chairman of the Department of Statistics. He has written numerous articles and a text book in the field of statistics and has particular expertise in social statistics. At trial he presented a number of studies of 542's composition, ascertaining, *inter alia*, the number and proportion of minority union members, the pool of minority persons available for operating engineer work, the number and proportion of minority entries from 1966 to 1975, the numbers of minority persons entering the union via the various available means, and the comparative hours and wages of minority members. From such studies he was able to draw conclusions relating to the likelihood of discrimination in the 542 hiring hall system. This case, like most cases involving statistical proof, involves among the expert witnesses some evidentiary conflicts which require the fact finder in turn to make findings of credibility. *Upon balance I find Dr. Siskin's testimony to be credible, persuasive and accurate on these subjects and on the other subjects of his testimony. The testimony of the other experts who differ does not cause me to repudiate or modify my finding as to Dr. Siskin's credibility.*

1. *Membership Disparities*

Based on the computer tapes of a "Master List of Active Members" provided to Dr. Siskin by the union (with key punch errors being corrected through the annual pension files), Dr. Siskin determined the union membership to be 6,051 as of December 31, 1971. This figure includes the parent body, branches A through D, and the Registered Apprenticeship enrollees. (Holders of registrant books are not counted in this tabulation and are not considered by the union as members.) There were two hundred and thirty-five black members. Thirty-three more were members of another minority. Thus the composition among active members of Local 542 at the end of 1971 was 3.9% black. When all minorities are con-

sidered, the minority composition of the union was 4.4%. These 1971 percentages are very nearly identical when pension welfare, and honorary members (inactives) are included in the membership definition. The following table reflects the composition of 542, including pension, welfare and honorary members, for the years 1966-71:

Year	Membership	Number of Minorities	Percent Minority
1966	5092	174	3.42
1967	5385	182	3.38
1968	5703	216	3.79
1969	5995	261	4.35
1970	6192	255	4.12
1971	6453	289	4.48
1972	6631	307	4.6
1973	6942	344	5.0
1974	7066	356	5.0
1975	6974	336	4.8

Based on the 1970 census data for the area covered by Local 542's jurisdiction, the total population is 7,729,-115 of which 888,370 or 11.5% are black and 33,073 or .4% are members of another minority group. Limiting the population to males between the ages of 18 to 65, in order to define more precisely the pool of potential applicants, the figures become 11.0% black and 11.5% minority. The 11.0% and 11.5% figures are a conservative statement of the available black or minority labor pool. This was Dr. Siskin's conclusion and I agree. Siskin's best estimate, however, was 12.7 to 13.4% black and a total of 13.2 to 13.9% minority, taking into account by his calculations labor force participation rates, the census undercount, education and occupation and disregarding particularly the suggested factors of automobile and telephone ownership.

Using the conservative 11.0% and 11.5% result, the membership of Local 542 as of 1971 was grossly disproportionate to the 3.9% black and 4.4% minority percentage in the labor pool. The likelihood that such a disparity would occur by chance is less than 1 in 100

trillion, less than 10^{-23}. Of course, if Siskin's greater percentage figures, which I find on a preponderance of the evidence to be accurate, were used, the disparity would increase still further. Notably the disparity remained extremely significant as against the conservative labor pool figures as of 1975 when the minority percentage (four years after the initiation of this suit) had risen to only 4.8%.

2. *Discrimination in Entry*

In addition to demonstrating this gross disparity, plaintiffs' expert, Dr. Siskin, compiled data principally from union exhibits indicating the ratios of minority entry into the union (parent, A, B, C, and D branches and the RA program). During the period 1966-1971, 2601 new members entered 542. Minorities entered at the following rates:

	Blacks	Minorities
1966	5.1%	5.5%
1967	2.6%	2.8%
1968	5.8%	5.8%
1969	8.2%	9.8%
1970	3.8%	4.8%
1971	6.8%	8.7%

The total black entries for the union as a whole were 143 or 5.5% over the course of these years and the total minority number was 166 (6.4%). The direction of the entry rate (increasing or decreasing) fluctuated during this period, so it is not possible to deduce with absolute certainty any definite trend, although in the last three years before suit (1969-1971) the average entry rate was 6.4% black and 7.9% minority. The difference between this average and the conservative labor pool percentage is statistically significant at less than 1 in 1,000,000 (*i.e.*, the probability that the difference can be explained by chance is less than one out of one million). On the basis of random entry one might reasonably expect almost 300 minority entries between 1966 and 1971. The difference between this expected number and the lesser actual number is 133—44%. By the end of 1974,

the minority membership of Local 542 was 4.3% black and 4.8% minority out of 6725 members. As will be developed below, there are no other factors which would fairly require a finding that this gross disparity is not the result of discrimination. There is no sufficient evidence to explain that this disparity occurred because of any valid job-related qualifications not possessed either by members of the minority labor pool or by actual applicants for union membership.

Even after suit, from 1972-1974, the minority entry ratio into the union is at 7.4%, not far from the 6.4% pre-suit figure applicable between 1966 and 1971 and less than the 7.9% rate between 1969 and 1971. In 1972, 5.9% of entrants were minority; in 1973, 8.1%; in 1974, 8.0%; and in 1975, based on union data after excluding reinstatement and withdrawals, only 1.5% (adjusted from 2.8%).[18]

In the data given above, C and D branch members were properly included in assessing the extent of 542's discrimination in part because the C and D members are indeed union members and because transfers can be affected from C and D into the parent body construction trade, thus affecting the general measure of availability of entry into the construction trade and the employment prospects of the plaintiff class. (The entry data for the years 1972-1975 does not include D branch members.[19]) Plaintiffs' arguments that Local 542 has discriminated are indeed based in part on the assertion that the union maintained primarily white entry methods and primarily minority entry methods. For purposes of analyzing this contention the data on entries into the union will be broken down (in rounded figures) into branch or division.

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[18] The adjustment is made by subtracting the withdrawals and reinstatements from the group considered to have entered in 1975.

[19] Union's Exhibit 254 indicates that there were only two D branch members between 1972 and 1975.

	Parent, A & B		C & D	
	Black	Minority	Black	Minority
1966	3.7	3.7	8.4	9.0
1967	2.2	2.7	2.4	2.4
1968	6.0	6.0	6.4	6.4
1969	8.1	8.9	8.7	11.1
1970	5.3	5.3	0	1.9
1971	10.7	12.7	2.0	4.1

The overall average entry rate from 1966-71 is:

	Union	A & B & P	C & D	RA
Black	5.5	6.4	4.6	4.3
Min.	6.4	7.0	6.0	5.0

The overall average entry rate from 1969 to 1970 is:

	Union	A, B, P	C, D	RA
Black	6.4	8.3	3.3	6.4
Min.	7.9	9.4	5.8	7.5

For each of the three year averages (1969-71) the disparity from the minority labor pool percentage is statistically significant (less than a 5% probability of chance occurrence). For the union as a whole, including C and D branches, during this three-year period the disparity is significant such that the likelihood of these overall figures occuring by chance is less than 1 in 1,000,000.

In the period from 1972 to 1974, 7.4% of entries into 542 were minority members: 8.0% parent body, A, or B; 1.7% C Branch; 18.2% RA.[20] The very high RA figure comprises entrants into the four-year program. If instead of examining the number of minority entrants into the RA program we look to the number of minority graduates moving from RA status into the operating branch for this period, the 18.2% figure diminishes to about 5.9%. This latter percentage is in many respects the most meaningful in measuring the minority participa-

[20] This last figure may actually be 18.9% based on calculations from Plaintiffs' Exhibit 253(f)-(h) indicating the rate of minority entry from 1972-74.

tion of registered apprentices. Furthermore, as the minority RA entrants have increased in this period, the minority C Branch entrants have diminished somewhat, so that apparent increases in participation by minorities in the RA program are not absolute increases. If the RA minority graduate figures are used instead of RA entry figures, the overall percentage of minority entrants into Local 542 during 1972-74 is 4.9% instead of 7.5%; this makes a decrease since the filing of this suit in 1971 when the average rate of minority entry between 1971 and 1966 was 6.4%. Although the RA program will be discussed separately under the heading "JATC," it is clear that a careful evaluation of the statistical proof reveals continuing discrimination. Thus as of 1976, two years after A and B branches were abolished, the Parent Body was 5.8% minority, the C Branch 3.9%, and the Registered Apprentice Program (including entrants) 12.7%. Excluding inactives the percentage of minority union members (counting RA entrants) at the outset of 1976 was 4.87%. The fluctuations in methods of entry strongly suggest manipulation. This is corroborated by other proof.

3. *Disparities in Hours and Wages*

The second major component of plaintiffs' statistical proof concerns the proportionality vel non between the hours worked and wages received by white members and by those minorities who were able to become members of Local 542. Dr. Siskin performed two basic studies inquiring into this matter. In the first he compiled from the union's Master List of Active Members all the hours worked by whites and minorities during 1969-71 and estimated by a standard formula of hours worked in recent years just who was in Group I, II or III. In the second, using the Master List he examined the hours worked and wages obtained during 1972, making correlations to the out-of-work list and the respective operating branches of 542 so as to compare even more closely like

groups of white and minority workers. Both studies excluded consideration of C Branch and D Branch and registrants.

The result of Siskin's first study based upon health, welfare and pension records is indicated in the following table.

Year	% White Hours	% Minority Hours
1969	96.42	3.58
1970	96.30	3.70
1971	96.38	3.62

When one compares the minority labor pool percentage (11.5%) to the minority member percentage of hours worked, the disparity is still greater than that revealed by the comparison between the minority labor pool and the 542 operating membership.

Plaintiffs' first study sought to account for differences in age, district, branch, seniority, and out-of-work list status by use of a regression analysis. After accounting for these factors, Dr. Siskin nevertheless concluded that white operating engineers in the studied branches worked 109 hours per year longer and at higher rates than minority members on account of race. Siskin concluded that the racial disparity was statistically significant and would not be decreased by the addition of other variables. This means that minority members received $717 per year less than whites. In addition to this loss, Siskin concluded that minorities lost on the average $262 per year due to maldistribution among branches.

Upon receiving master list data for 1972, including for the first time exact wage information and group status, Dr. Siskin repeated his analysis for that year, excluding from consideration all those individuals on the list who began during the course of 1972. Siskin also analyzed in this study the raw wage and hour differential among the branches and among out-of-work listings. Once again, only Parent, A, B, and RA branches union-wide were analyzed:

	Group List	Ave. Hrs. White	Ave. Hrs. Minority	Difference
P	I	1799	1592	207
B	I	1713	1587	126
B	II	1483	1171	312
A	—	1684	1513	171
RA	—	1580	1415	165

The average racial difference in wages by branch and group list unionwide is correspondingly as follows: [21]

		Ave. Wages White	Ave. Wages Minority	Difference
P	I	$16,312	$15,044	$1,268
B	I	14,250	13,566	684
B	II	11,489	9,889	1,600
A	—	11,512	9,928	1,584
RA	—	11,046	9,487	1,559

The average overall disparity unionwide in 1972 hours and wages is revealed by the following table:

	White	Minority	Difference
Average Hours	1727 hrs.	1551 hrs.	176 hrs.
Average Wages	$14,718	$13,232	$1,486

After also subjecting the raw 1972 results to a regression analysis (so as to equalize factors of age, district, branch, seniority, and group out-of-work list status), Siskin concluded that whites on the average worked 97.5 hours more than minorities in 1972 and earned $749 more. This is indeed close to the 1969-71 estimated

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[21] The possibility of an interdistrict effect on these differentials was also explored by analyzing District I according to the same standards. District I holds 85% of 542 but only about 50% of white members. Siskin concluded that the District I analysis produced the "same general result." P-168, Rpt. 7 at 12. This analysis produces results reasonably comparable to those for the union generally: whites of any branch and list group work more hours than minorities of comparable status. Notably, the rate of pay differential between minority and whites in District I is greater for A branch, B branch (Group I), and RA, but the 1972 study roughly confirms Siskin's earlier estimate of the differential.

result. It must be emphasized that the disparity in average hours worked is not a result of the effects of low priority out-of-work list group or seniority. The discrepancies accrued while these factors were equal.

4. *Referrals*

Closely tied to plaintiffs' proof of a differential in minority hours and wages is the proof of an arbitrary system of referrals. Siskin's analysis on this subject was limited to District I, although in a separate analysis unionwide clustering of minorities with a limited number of employers was also shown to exist. First I will detail the District I study.

Siskin's study of the District I referral system involved an analysis of seventeen out-of-work lists from among the various groups (five from Group I, one from Group II, five from Group 1-A, and six oilers and RA lists). The seventeen lists were the remainder after eliminating all lists during that period with less than forty names. This was to assure statistical significance. Each list had been used for one of any of the months between 1969 and 1971. A rank was then assigned to each person on the list according to his position. Referrals were counted based on the first referral date marked in a listee's work record. (A referral constituted any attempt to contact a worker including acceptances, refusals, or failures to achieve contact so long as noted in work records.) By computer, seventeen "selection" lists were created reflecting the actual order of referral.

By creating the selection list, Siskin was able to compare actual referral rankings to the work list ranking in order to determine the coefficient correlating the two lists positively negatively or neutrally. The appropriate numerical correlation (the Spearman rank correlation coefficient ("r")) ranges from "—1" to "+1". A "+1" correlation would mean that the two lists are identical; a "—1" would mean that they bear a perfect reverse order correlation; a "0" correlation would mean that the

relationship appears random. Based on Siskin's analysis the r correlation coefficients for the seventeen lists are as follows:

List number	r
Group I lists	
# 4	.20
# 7	.55
#10	.52
#13	.46
#16	.62
Group II	
# 2	.08
Group I-A	
# 3	.22
# 5	.40
# 9	.37
#12	.43
#15	.54
RA & Oilers	
# 1	.24
# 6	.38
# 8	.44
#11	.44
#14	.46
#17	.45

While all of the lists except list #2 from Group II were clearly on the positive correlation side, further analysis by Siskin revealed that virtually none of the lists reflecting actual referral rankings was *significantly* similar to the corresponding out-of-work list.

This conclusion was reached after calculating the "variance." In the present context the correlation coefficient (r) when squared (r^2) measures the variances in selection rank which is explained by the out-of-work list rank. The formula $1-r^2$ measures the variance in selection not explained by the out-of-work list. Of the seventeen lists examined, on only one was more than one-third of the selection rank predictable or explainable based on out-of-work list rank. On another list the position on

the out-of-work list explained only .6% of the selection list ranking.

List	Rank Correlation Coefficient (r)	Percent Variance Explained (r2)	Percent Variance Not Explained (1-r2)
Grp. I-A			
# 3	.22	4.8	95.2
# 5	.40	16.0	84.0
# 9	.37	13.7	86.3
#12	.43	18.5	81.5
#15	.54	29.2	70.8
Grp. I			
# 4	.20	4.0	96.0
# 7	.55	30.3	69.7
#10	.52	27.0	73.0
#13	.46	21.2	78.8
#16	.62	38.4	61.6
Grp. II			
# 2	.08	0.6	99.4
Oilers & RA			
# 1	.24	5.8	94.2
# 6	.38	14.4	85.6
# 8	.44	19.4	80.6
#11	.44	19.4	90.6
#14	.46	21.2	78.8
#17	.45	20.3	79.7

The average for all lists indicates that 82.5% of variance is the result of factors *other than* order on the out-of-work list. Although there exists a possibility that selections based on skill could theoretically have created discrepancies in selection rank, plaintiffs point out, and I agree, that the low correlation on the single skill oilers and RA lists (a correlation very like that for the other lists) itself tends to disprove the theory that "skills" explains the variance.[22]

[22] It is also noteworthy that the process of making referrals based on skill was not an absolutely formal one and did not, according to Mr. Ciavaglia, the District I dispatcher, arise "that often." Tr. 2035. Skill reversals were made by Ciavaglia according to his memory and work record notations. The work records are a wholly unreliable source of skill information.

The next statistical test performed on the seventeen lists was to determine whether predictability of selections from out-of-work list ranking increased depending on the type of list. A table indicating the percent of explained variance within groups, with and without ranking those who were not referred at all, is below:

Group	Including non-referred	Deleting non-referred
I-A	15.7	14.2
I	20.6	21.9
II	0.6	2.0
Oilers & RA	15.8	14.1
	17.5	17.6

The percentage of explained variance is relatively small.

Siskin prepared yet another chart, an "expectancy chart," indicating the probability of selection for persons listed in respective quintiles of each out-of-work list:

Percentage Probability of Selection Order Compared to Work List Order

		Percent Selected in Quintile of Selection List					
		1st	2nd	3rd	4th	5th	
Quintile on out-of-work list	1st	24.0%	24.0%	17.8%	17.5%	16.6%	100
	2nd	29.0	28.3	15.5	15.1	12.1	100
	3rd	32.2	28.9	17.2	12.6	9.3	100
	4th	14.0	18.7	34.1	17.4	15.8	100
	5th	2.1	1.1	16.7	36.4	43.8	100
		100	100	100	100	100	

As can readily be seen the probability of selection is not increased by being in the first or even second quintile on the out-of-work list, although someone in the fifth quintile of the out-of-work list is not at all likely to be selected among the first or second selection list quintiles. While this analysis in itself does not seek to identify race as the factor creating the lack of correlation, it confirms that the out-of-work list ranking is simply not the principal basis for selection. This corroborates plaintiffs' claims of discrimination in the sense that it proves there

is much room for arbitrary and standardless selections. When combined with the other statistical disparities considering the race factor directly, this correlation study aids the inference of discrimination.

Corroborative of the above data is the calculation of data indicating clustering of minority workers referred through the hiring hall system of Local 542. For the period 1969-1971, Dr. Siskin examined union pension records for all districts and determined that 69.6% of the 1488 employers reporting hours for the period reported no minority hours at all. The breakdown by years is as follows:

Year	Firms Reporting Hours	Active Firms Reporting No Minority Hours	Percent Reporting No Minority Hours
1969	1934	773	74.8
1970	1061	762	71.8
1971	1035	757	73.1

Twenty-three employers, according to Siskin, employed minorities during the three-year period as at least 10% of their total hiring hall employees. These companies were all in District I. They accounted for 32.41% of all minority hours in that district but only 5.96% of total District I hours. Further, these employers received 17.17% of District I minority referrals but only 7.43% of all District I referrals.

H. *Other Proof*

Proof of gross statistical disparities may itself constitute a prima facie case of intentional pattern and practice discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977). In this case there is more than statistical disparity. There is evidence of the local union's intentional deceptions to avoid application of the Philadelphia

Plan as well as evidence of deception in denying the Benjamin Franklin graduates union membership. These deceptions (particularly relating to the Philadelphia Plan) were, I find, engaged in with the purpose of appearing to advocate equal minority participation, and hence of assuring the flow of federal contract monies, while at the same time duplicitously resisting such participation at meaningful steps of implementation. Plaintiffs need offer no more than this to establish their class claim of intentional discrimination and bring the abstract statistics to life. Plaintiffs' other proof consists, in part, of evidence showing specifically enumerated departures from customary entry methods and a relation between method of entry and race which cannot be viewed as coincidental. Plaintiffs also have presented testimony of twelve minority individuals relating their experiences in seeking access to the union hiring hall. Both types of evidence seek to prove a pattern of discriminatory conduct, or to corroborate other proof of discrimination, without relying directly on an expert's opinion concerning the exact probabilities that the specific instances can be generalized. Such evidence has long been an important part of employment discrimination suits and assumes evidentiary significance by establishing or tending to confirm in the concrete that which statistics have abstractly assured was highly probable. Both types of non-statistical proof may create or corroborate an inference of discrimination.

1. *Entry Discrimination*

First for consideration is the proof of a variety of methods for entering Local 542 which have either departed from the customary entry avenues, and in the process have provided primarily white entry routes, or in the ordinary course of operation have resulted in the exclusion of a disproportionate number of minority applicants.

The initial formally permissible methods of, or steps toward, entry are through what are called A and B branch Organization, C and D branch Organization, C branch Miscellaneous, the Registered Apprenticeship Program, and the Registrant Program. As indicated earlier intra- and inter-union transfers may also be accomplished.

Entry through A and B Organization may occur when employers previously not committed to the union bargaining agreement decide to become committed. Their construction work forces are issued union books at that time without having to meet any qualificational criteria. (A and B branches were abolished as of December 31, 1974). Entry through C and D branch Organization is accomplished when non-union workers choose the union as their bargaining agent, usually by an election procedure. C branch Miscellaneous entry is the entry route for new workers hired by employers whose workforces had previously been organized. The Registered Apprenticeship Program, a four-year training program, provides an entry method for essentially unskilled would-be operators who meet certain qualifications and who pass written tests.[23] Lastly, there is the registrant program, A and B. A-registrants were unskilled persons desiring to be operating engineers who simply registered with the union and obtained an A-registrant book. After achieving 2500 hours of experience membership in the union became available. This method of entry was eliminated in 1968. B-Registrants, prior to August 1, were those claiming to be experienced operating engineers who were issued B-registrant books. On August 1, 1970, however, a written and field testing procedure went into effect to verify the qualifications of B-registrants. These tests have not been validated as to their job-relatedness.

Intra-union transfers render entry into the non-construction branches relevant to the issue of entry into

[23] This is described more fully under the heading *JATC* below.

the construction branches. Branch members may transfer into construction, by varying accounts, either after attaing 2500 hours, after attaining journeyman C branch status, or without restriction or specific rules. Transfers into the parent body could be effectuated from A branch after four years or B branch after three years. Inter-union transfers have also been permitted.

The following table, based on union records, indicates the minority composition of persons entering 542 through the above described methods between 1970 and 1975:

Entries	A-Registrant, A Organization B Org.; C Org.; C Misc.	B Registrant (Skills Required)	RA (test and diploma)	Total
White	1414	581	338	2333
Minority	27	79	59	165
Total	1441	660	397	2498
% Min.	1.87	11.98%	14.86	6.6%

From this data it is a simple matter to determine that most (60.6%) white entrants into 542, or into a category through which access to 542 could be attained, entered without being subjected to any standards of qualification. Only 16.4% of new minority entrants or affiliates, however, entered in such a way. Only 14.5% of whites entering or becoming affiliated with 542 entered through the Registered Apprentice Program although 35.8% of minority entrants or affiliates came into their positions through the RA program. A significant 47.9% of all new minority entrants or affiliates in this period became B registrants, while only 24.9% of whites achieved this status.

A closer breakdown reveals even more emphatically the minority underrepresentation in entries via B branch Organization:

	A Orig.		B Orig.	
	Total	Minority	Total	Minority
1970	1	0	27	1
1971	5	0	58	1
1972	3	0	76	2
1973	1	0	103	0
1974	0	0	93	3
1975	0	0	20	0

Only seven out of 377 B Organization entries were minorities, a total of about 1.9%, much less than either the minority labor pool percentage or the percentage of minority union members.

Focusing on C-Branch also reveals diminutive minority participation in the new entries to that branch. Between 1970 and 1975 only 8 (1%) of 768 C Miscellaneous entries were minority members, and only 11 (4.5%) of 242 individuals entering by way of C Organization were minority members. By 1976 minority representation in C branch was only 3.9%.

As the minority rate of entry into and population of C branch has become relatively insubstantial, the minority representation among registrants has been fairly constantly greater than the minority labor pool percentage in the 542 geographical realm.

	District I			Union		
Year	Total	Min.	% Min.	Total	Min.	% Min.
1972	233	49	21.0	340	55	16.2
1973	163	32	19.6	224	34	15.2
1974	145	32	22.1	196	33	16.8
1975	121	27	22.3	169	28	16.6
1976				144	24	16.7

The rate of minority entrants into the registrant program between 1969 and 1975 was itself commensurate with labor pool percentages at 12.4% (103 out of 832). Of 44 A registrants entering Local 542 between 1970 and 1975 only 1 was a minority. Given these indicia, it

is reasonable to conclude that there was among entrants a minority concentration in the B registrant non-member group.

What is indicated by these discrepancies is that the union maintained channels of access which were in practice primarily white entry channels or primarily black entry channels. Those channels which were primarily black tended to be the ones with the strictest requirements. The B registrant entry and RA entry were the only methods requiring any testing.

The segregative channeling effect is explained somewhat by other non-legitimate methods through which entry or affiliations with 542 have been accomplished. Foremost among these methods is the simplest—direct and unexplained entry. Plaintiffs have assembled a list of forty-three white individuals who have entered 542's parent body or A or B branches since 1970 without having been registrants and without having entered through organization, C branch, RA program or inter-union transfer. No minorities have entered in this way.

Particular instances of direct entry also provide an insight into the union management's role therein. The direct entry of one Nicholas D'Ambrosia, Jr., son of a former member of 542's Executive Board, received emphatic treatment in plaintiffs' proof. Testimony at trial reveals that Robert Walsh, business manager of 542, was informed that D'Ambrosia possessed no union book of any kind. Walsh instructed Ciavaglia to remove D'Ambrosia if this was found to be true. Ciavaglia determined that D'Ambrosia had been improperly referred as an oiler by one of the District I business agents, Joseph O'Donoghue. O'Donoghue refused to alter his position, while not denying its impropriety in his discussion with Ciavaglia. D'Ambrosia was never removed from his job. This case is illustrative of the numerous instances of nepotistic direct entries documented by plaintiffs. Although these instances cannot here be

detailed, plaintiffs' documentation as referred to in the Introduction is credited.

2. *Individual Testimony*

The experiences narrated below, while not necessarily presented to establish individual claims of intentional discrimination, reveal a pattern which is consistent with and therefore relevant to the pattern of resistance to union entry established by other evidence including statistical proof. It is with this characterization that the following redaction of individual testimony is provided. The order of presentation is primarily based on the date of union affiliation.

(a) *Samuel Long*

Years ago Samuel Long learned to operate heavy equipment in the Army in a segregated unit which trained at Fort Bragg. After service time on construction in Africa, Long was honorably discharged in 1944.

Long unsuccessfully attempted entry into 542 by seeking work three times betwen 1950 and 1956 from a master mechanic at the United States Steel plant in Morrisville. His father-in-law was an operating engineer there. (In the meantime he had been employed by non-union contractors at the Philadelphia Navy Yard until 1953 and later in private industry.) In 1956 Long was accepted into the union as a B branch member after finally obtaining employment at the U.S. Steel plant. In 1959 Long entered the parent body and in 1960 he was on the campaign committee for Robert Walsh, who, Long testified, campaigned for the position of Business Manager on a ticket opposing discrimination against blacks, Irish and Italians.

Long's testimony does not reveal discrimination by the union against him. He apparently did not apply directly for union membership during his efforts to obtain employment at U.S. Steel. However, Long's testimony as to the foundation of Mr. Wash's campaign for busi-

ness manger provides some background evidence that the issue of racial discrimination was alive prior to the time period defined by the statute of limitations in this suit.

(b) *Willis Fox*

In April, 1958 Willis Fox obtained a job with a Philadelphia contractor, Amenio De Paul, and began work as a laborer. He was later assigned to backhoes and other equipment before being laid off in June, 1961.

Fox's initial attempt to join Local 542 was in August 1961. At that time James Grant, the hiring hall agent, informed him that the books were frozen—that too many men were out of work and his application would not be accepted. Fox returned to work for De Paul, and later worked for Mario Massi, first as a truck driver and then as an operator. In August 1964, Fox returned to the Hall again seeking entry into Local 542, and was told to return in October. In October Grant told him to return in November at which time he completed his application, paid $40.00 in fees, and was issued a B registrant book. Three years later, in 1967, he became a member of Local 542.

Fox testified that both as a registrant and B branch member his referrals were exclusively dirt work jobs operating loaders and pippins (relatively low-paying machinery); he received no referrals for cranes or graders. When he complained in early 1969 about this, Ciavaglia stated that upgraded referrals were impossible because so many men were ahead of him. Fox's response was to find crane work through another local in New York, and over the next five years, spanning July 1969 through February 1974, he worked intermittently in New York as a crane operator. Fox's association with Local 542 continued through that period.

Fox reported being sent out by Ciavaglia on a Heister roller to the Glasgow, Inc. on August 23, 1973. All three rollers at that job site were operated by blacks. The

master mechanic had promised that Fox would be reassigned to higher paying equipment when it came in, but instead assigned whites over him. At that point Fox quit and returned to New York.

(c) *Robert Ahmad*

Robert Ahmad received training in sheet metal drafting before completing a correspondence course in surveying, maintenance, and the operation of front end loaders, dozers and scrapers from the Training Service Institute. His field training consisted of a one-month course in operating the front-end loader, dozers and scraper, and was completed in August 1963. Ahmad gained work experience as an operating engineer from George Saul Metals, a non-union contractor.

Ahmad's first attempt to join Local 542 was in October 1963. James Grant told him that the books were closed and no work would be available until the summer. Ahmad's frequent subsequent contacts with the hiring hall in search of employment proved fruitless, and by spring 1964 he had accepted a job as a truck driver. Although Ahmad testified he continued to contact the union weekly throughout 1964, he received no referrals. Ahmad got his first job in July 1965 by volunteering for a three-day job and falsely representing that he had the required registrant's book. He ultimately worked three weeks on a front-end loader and was laid off when the job ended. When James Grant, the hiring hall agent, later confronted him with his misrepresentation, Ahmad explained that it was the only way he felt he could get work. It was then that Grant accepted Ahmad's tender of union fees and dues, issued him a B registrant's green book, and told him he would get oiling jobs.

Between September and November 1965, Ahmad received six referrals, four of which were oiling jobs. His next referral did not come until May 1966—a one-day job. Ahmad testified that his referrals appeared to cease at a point in November 1965, a time when William

Ciavaglia replaced Grant as the hiring hall dispatcher. Ahmad filed a complaint of unfair discrimination with the Commission on Human Relations sometime during this period, but the Commission ruled against him.

Ahmad applied for the union apprenticeship program on December 27, 1965, but was told by Robert Emrick, the apprenticeship coordinator, that he was ineligible because he had previous experience on operating engineers' equipment. Emrick then stamped a "B" on Ahmad's registrant's book, designating it an operator's book. In spite of this Ahmad continued to pursue admission to the apprenticeship program, for upgrading his skills, and took a written test. In May 1966 he was notified of his disqualification because of low scores.

On July 3, 1966 Ahmad was again contacted by James Grant, then the C Branch agent, and told to report to the Union Paving Company. Grant informed Ahmad that his affiliation would be with the C Branch; Ahmad's acceptance was under protest that as a B registrant he wanted work commensurate with his operating engineer branch status. For the next two years Ahmad did no operating work, but did non-construction C branch type work, earning between $2.50 and $2.78 per hour. During that time Ahmad also accumulated over 3,000 hours. Because of this, Grant verbally informed him that his branch affiliation would have to change formally to C. Again, under protest, Ahmad acquiesced. He stated he was never informed of his eligibility to transfer from C Branch into the parent body of Local 542.

Ahmad participated in three training programs while in the C branch. Grant informed him of Operation Stepping Stone although Ahmad received no written notice. Ahmad completed the program on April 13, 1969, having received training on the back hoe. Ahmad also trained at the union training site in Delaware for a period of one month in both 1970 and 1972, learning crane operations.

After Operation Stepping Stone Ahmad received no union referrals for backhoe or crane work. Under Grant's encouragement, he finally accepted a job as a cement mixer with Warner Company at $3.36 per hour. He later testified that while at Warner he worked in five different shops, and from his experience, only whites were crane operators or front-end loaders. Mixers, he testified, were black. As of November 1976 he was still employed at Warner in the same capacity, but earning $8.00 per hour. Ahmad indicated that since his work with the C branch was permanent, he had decided against leaving, having relinquished hope of obtaining work as an operating engineer.

(d) *John Dent*

John Dent received his initial training in heavy equipment operation during three years of military service ending in March 1963. In January, 1964 he enrolled in the Associated Heavy Equipment School in Florida, completing a six-week combined crane and diesel mechanic course. He then moved to Philadelphia in March, 1964, seeking work as an operating engineer, and discovered that hiring practices required that he proceed through the union.

Dent's first contact with Local 542 was in late March or early April 1964, at which time he was informed by James Grant that no work was available and that he should return in the summer. He was given no information regarding the operational procedures of the union or its branches, nor was he given an application form, despite his stated intent to apply for membership.

Over the following two years Dent made numerous unsuccessful attempts to gain entry into Local 542. Finally, with no apparent indication of why his request for entry to the hiring hall system was accepted, Dent was permitted to become a green book registrant on April 1, 1966. He paid $30.00 in dues and completed an apprenticeship training application, leaving it with

Ciavaglia and Grant. Dent, however, never participated in the apprenticeship program. Although Robert Emrick, the apprenticeship coordinator, had informed him sometime during the summer of 1966 that he was listed and would be notified, he was informed seven months later in November 1966 by Emrick's secretary that he was not on the list. In a follow-up inquiry in early 1967, Emrick informed Dent of his ineligibility for the program based on his green book registrant status. (As indicated below a number of white B registrants were admitted to the RA program.) Dent also did not receive his first job referral until November 1966, seven months after his registration. This job was with a rental company and Dent was laid off after one week; his second referral was not until June 1967. All in all, during his green book registrant period, ten of Dent's fifteen referrals were rental company jobs (short-term work) operating pippin back hoes. He received no referrals for the high paying crane work. He was never officially informed of the upgrading program Operation Stepping Stone. After becoming aware of its existence through the Labor Department and from other journeymen members of 542, Dent subsequently applied and completed the six-week program in February 1969.

In December 1969 Dent became a B branch member, having completed the requisite 2500 hours.[24] Even with B branch status, about 90% of Dent's work was limited to the pippin back hoe—there were no referrals for cranes and other heavy equipment—and these jobs were primarily rental company referrals. Dent also discovered that whites below him on the out-of-work list were being called ahead of him. He testified that he had checked the out-of-work list positions of several whites whom he observed on jobs for which he was qualified and discovered after examining the lists that they occupied a list position beneath his. He also witnessed a situation in

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[24] Dent became a parent body member in August of 1973.

which a black, ostensibly laid off due to the unavailability of work, was replaced by a white worker on the next day.

During Dent's association and membership with Local 542, dating from June 1967, his jobs ranged in length from one day to several months, although short-term jobs were the norm. Dent was laid off either when there was no need for his equipment or when his jobs were finished.

The record also indicates five instances between June 1968 and July 1974 when Dent refused work referred to him by the union, and one instance where he quit a job in July 1972. Dent's refusals to work were based alternately on his objections to the distances involved, the brevity of the work during cold weather, and his lack of familiarity with the equipment used. His quitting incident was precipitated by a disagreement over work rules with the job contractor.

On June 20, 1972, Dent was one of those attacked by a group of white operating engineers at the District I hiring hall in retaliation for the filing of the present suit. He recounts being treated poorly on his job afterwards. He testified that he was given particularly undesirable work, such as a summer job in the "hole," 40 to 50 feet underground, breaking concrete with a hydraulic hammer. Two years later, in August 1974, Dent and his family left Philadelphia to relocate in Georgia, because of what he felt to be intolerable working conditions existing in Philadelphia.

(e) *Elijah Dukes*

Elijah Dukes began his operating work in the 1950s. The first union contractor who employed him was the Plumbing and Heating Service Co. At laborer's wages, he operated a pippin for about five years. In 1958, Dukes was told by a 542 business agent—a Mr. O'Donoghue—to leave his equipment. He did not hold a union book or a registrant's book. His immediate replacement was a white employee. The business agent told Dukes that in

the next spring he would be taken into the Local. But Mr. Grant refused even to give Dukes an application. (At some time Dukes did file a card with 542 but was never contacted and did not know the significance of the card.) Once, twice, or more per week Dukes returned for a time to the 542 hiring hall in vain.

Dukes moved on to another union construction company but was still unable to enter the union. On about three more occasions he was removed from an operator's job at the behest of a union business agent. This time such removal resulted merely in reassignment to another pippin. All in all it took Dukes eight years, until August 1, 1966, to obtain a registrant's book.

(f) *Charles Iseley*

Charles Iseley, after successfully completing in 1966 a six-week privately operated training course for operating engineers, sought entry into the union. He was not aware of the existence of the registrant or apprenticeship programs, and despite conversations with Ciavaglia was never advised. Iseley's attempt to enter the operating engineers profession was met with advice from Ciavaglia to obtain two references. He could not obtain such references at the hiring hall after repeated visits. Although Ciavaglia advised him to see Al Holland, Ciavaglia did not give him Holland's phone number. He admitted that Holland was difficult to find. On one occasion he obtained work from a union employer, but when three men asked him whether he had a book and he responded negatively, they asked him to leave the equipment. He refused, but was dismissed several days later. Thereafter he was employed in the Philadelphia prison system.

Much later, responding to a newspaper notice regarding an Outreach Program, Iseley met Al Holland. Thereafter in 1971 Iseley applied for and took a written and field test for classification as a B registrant. Although he passed the written test he failed the field test which

related to front-end loaders. Admitting his failure on this piece of equipment, Iseley observed: "I guess I may have been a little rusty after '66 to that point." Tr. 6387. He then became employed at Community Legal Services as an investigator and has never since worked as an operating engineer.

(g) *John Dodson*

John Dodson attained experience operating cranes, bulldozers, and other heavy equipment in the Philadelphia Navy Yard and several other places, and in 1954 was employed by Cheltenham Township, a suburban community north of Philadelphia, as a dump truck driver and then as a heavy equipment operator. Because Cheltenham had a contract with 542, the union business agent, Robert Helman, objected to his working on equipment without a "book." Dodson sought a book only through his employer, not directly from the union. Even after several years he had not received one.

Dodson later worked for Marino Massi as an equipment operator. Massi's company was a union company, but Massi was aware that Dodson was not a member and had no book. Two business agents removed Dodson from his job a total of about seven or eight times between them. In about 1960 Dodson went to the hiring hall requesting an operators' book and was denied one because, in the recounted words of union official James Grant, "We got too many men out of work ourselves." Tr. 7049. On another occasion in 1967 or 1968, Dodson took to the hiring hall a note from Mr. Massi saying he owned two pieces of equipment, on the theory that it would help him obtain a book. Grant told him that if an operator were put on both pieces he would consider Dodson's request. Dodson then related: "So, I said, what am I supposed to do? He said, well, go drive a truck." Tr. 7051. Shortly thereafter, the dates are somewhat confused, Dodson removed to New York where he did receive a parent body book from Local 15. Subsequently

he returned to Philadelphia and spoke to Grant who told him 542 needed operators. Sometime in 1968 he received a book and began receiving referrals. Although Mr. Walsh wished at first to give Dodson a B registrant book, Dodson insisted on and ultimately received a parent body 542 book on the ground that he was a parent body member of Local 15.

(h) *Lloyd Hudson*

Lloyd Hudson is a Vietnam veteran, honorably discharged in 1966. In order to begin a career as an operating engineer he attended a Training Services Institute program in Northeastern Pennsylvania from April 1968 to September 1968. This program has no apparent connection to Local 542 or any other defendant, and Hudson became aware of it through the Commonwealth's Bureau of Employment Security (BES).

Having successfully completed his six-month program, Hudson went to the union hiring hall and spoke to Al Holland, showing him his training certificate. Holland said he would be in touch with Hudson "in the near future." Tr. 6400. Holland took Hudson to Emrick who also said he would be in touch. With the exception that Hudson subsequently encountered Holland at the hiring hall and was told that nothing was available, no one from the union ever called or contacted him. (Hudson did make a phone call to the union and spoke to some unspecified individual who referred him to Holland. Although Hudson was told that he "first must be a member of the Local," Tr. 6403, it is not positively clear that Hudson ever told that person that he was inquiring into anything but membership in the union.) At no time, however, was Hudson ever advised of the existence of a JATC, registrant or C branch entry.

On September 23, 1968, after receiving no satisfactory communication from the union, Hudson took (at the suggestion of Mr. Sgrow from BES), a BES test, one of the two tests used to determine admittance to the

JATC program at that time. Mr. Sgrow wrote to Emrick the following day stating that Hudson scored "*considerably higher* than the minimum scores required." (Emphasis in original.) Hudson, never knowing of the JATC's RA program, did not file any application for it; nor did he receive any correspondence or other communication from the JATC. A file at JATC, however, reveals Hudson was rejected by letter of May 5, 1969, for failure to take the JATC test, of which he received no notice. Until 1970 Hudson was residing at the address he originally gave the union.

Cross-examination established that Hudson had been convicted of fraud in cashing stolen United States Government Social Security checks, a crime for which he received a three year sentence.

(i) *Duane B. Johnson*

Duane Johnson received his training in operating engineers' equipment during his service in the armed forces, accumulating four years of experience by the time of his October 28, 1969 discharge. Following a two-month program in equipment repair and maintenance, Johnson served for eighteen months in the Construction Engineer Unit in Germany operating front-end loaders, back hoes, graders, and dozers. In 1967 he was sent to Vietnam as a heavy equipment operator in the 15th Combat Engineers Unit, operating the same equipment, including cranes, oftentimes in the combat zone. Returning to the United States, he was assigned to the 75th Construction Engineers at Fort Meade, Maryland, again as a heavy equipment operator handling front-end loaders, dozers, graders, backhoes, scrapers, compactors, rollers and cranes.

Johnson's first attempt to join Local 542 was in September 1969 when he was advised by Ciavaglia to reapply after his discharge. Johnson returned within a week of that date, and was informed that his military service was not suitable for civilian purposes. Ciavaglia

told him that further training at a heavy equipment operating school would be necessary. Johnson was not told of the union's registrant program, procedures for obtaining a green book or taking a field test, the apprenticeship program, potential C branch membership, or the necessity of paying a service fee for work referrals.

Johnson borrowed $1,000 to cover the cost of attending a two-month program at the American Training Services, Inc., in New Jersey. He trained on the identical equipment he had used in the army. Upon completion in February 1970, Johnson returned to Ciavaglia and was told that because of the large number of unemployed, it would take at least one to two years for him to obtain work, but he would be put on the out-of-work list. Johnson continued to call or visit the hall weekly, but was unable to procure any jobs from Local 542 through the end of 1970. Johnson was informed at this point of the RA program and he applied for entry thereto toward the end of 1970. He was never notified concerning that application. Between October 1969 and December 1970 Johnson worked as an operating engineer on two nonunion jobs. In February 1971 he accepted a nonunion engineering job with I.T. & T. in Greenland where he worked until the end of 1971.

Johnson's third but unsuccessful attempt to join Local 542 followed his return to Philadelphia from Greenland at the end of 1971. At the beginning of 1972 he applied a second time to the Apprenticeship Committee, and at that time met Emrick. At the end of their conversation, Emrick gave Johnson his card, indicating that he should present it to Ciavaglia, the dispatcher. Ciavaglia refused to acknowledge the gesture, and Johnson was still without work.

In May 1972 Johnson was tested on the front-end loader, back hoe, and bulldozer as part of the union field test. He passed; this was the same equipment he had used in the army. He later spoke with Ciavaglia who

again indicated that high unemployment had virtually foreclosed present and near-future work opportunities for him. Johnson was not given a green book, and he was advised by Ciavaglia that it was unnecessary to pay dues since it would take at least two to two-and-one-half years before he would obtain work. He was told that he would be placed on the referral list. On cross-examination Johnson acknowledged he had on February 17, 1972, signed registrant papers which contained notice of referral fees, but he said that he did not pay the fees based on Ciavaglia's statement to him. He never received any subsequent notification from the union that his registration card had been withdrawn for any reason.[25] Concerning his RA application, Johnson was notified that because of changes in federal regulations he would have to reapply. He was told this after having successfully achieved a waiting list status. He had not received any response to his reapplication.

Johnson made other unsuccessful attempts to get union work during the summer of 1972 and throughout 1973. Finally, on August 30, 1973 he filed a charge of discrimination with the EEOC. One month later he received a call from Ciavaglia asking if he was available for work. Johnson testified that when he found out it was for "one or two days" he refused acceptance because he then held a steady job. As of November, 1976, Johnson has had no additional offer of jobs through Local 542, although he indicated that he still wanted to be an operating engineer and a 542 member.

(j) *George Benjamin*

As a young boy George Benjamin operated machinery on his father's farm in South Carolina. By the time he moved to Philadelphia at age eighteen, he had operated tractors, dozers, cranes and front-end loaders. For sev-

[25] It must be noted that despite Johnson's skills on several types of machinery and although he informed the union of these skills, no machinery skills were listed on the work record.

eral years he worked as a general laborer for wrecking companies, and in 1962 was hired by Hauser. Within a few months he was promoted to foreman, responsible for moving (not operating) heavy equipment on Hauser's union jobs. In 1963 or 1964 he began operating heavy equipment—including crane loaders, small dozers, and pans—on a nonunion job at a Hauser dump. Benjamin worked there through 1973 when he left to start his own demolition business. Never financially successful at this venture, he went to work for Hargrove Company, doing nonunion work on crane loaders and backhoes. As of November, 1976 he had returned to Hauser, again moving heavy equipment.

Benjamin attempted to join the union in the spring of 1969 and spring of 1970. Both times he was told by Ciavaglia that the books were closed and no applications were available. On his third attempt in 1971 he was given an application and later notified of his eligibility to take the registrant test (written and field). Benjamin passed the tests on October 21, 1971, and was told he could obtain a registrant's book at the hiring hall. On November 2, 1971 Benjamin paid $49.00 in fees and was issued a green book. He testified that Ciavaglia and Holland told him he would be notified for work, and relying on that did not actively pursue employment by regularly contacting the union. Benjamin's first job offer came by letter almost two years later, arriving while he was in North Carolina visiting his mother who was ill. His wife phoned him this information and he returned to Philadelphia that night, visiting the hiring hall in the morning. Ciavaglia had already dispatched another operator saying he could not reach him.[26] No other jobs were ever offered to Benjamin.

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[26] Benjamin's phone number had not changed since he became a registrant. He also testified that someone was generally at home even when he was not.

Benjamin also testified that he informed Ciavaglia at the time he was issued a green book that he could operate several specific

In addition, in spite of Benjamin's timely remittance of dues throughout the period from November 1971 through November 1976 (totaling $500), his name was omitted from the Group III out-of-work list from December 1973 through June 1975. In addition, testimony also indicates that although his name was on the July 1973 list, it was crossed off and he was not advised of that fact. (There is no testimony indicating whether he was excluded from the August through November 1973 out-of-work lists.)

Benjamin's most recent union contact was in October 1976 when he spoke to William Sautter about his situation. Sautter requested that he fill out a work sheet, and then advised him that the employment situation was bad but that he would be notified of the availability of work later.

(k) *Timothy O. Roundtree*

Timothy O. Roundtree became a green book registrant of Local 542 on January 2, 1970, after two previous unsuccessful attempts to gain entry. His first attempt was in October 1968. An unidentified woman at the union office informed him that the books were closed and that she could not help him. Roundtree's second attempt was in July, 1969, following a reprimand by Holland for handling operating engineers' equipment for Tony DePaul without union clearance. Holland directed Roundtree to contact Ciavaglia for union registration; however, when Roundtree approached Ciavaglia with Holland's message, Ciavaglia disclaimed any knowledge of that contact. Following a second reprimand in later December, Holland finally agreed to meet personally and register Roundtree at the Union.

Roundtree paid his $27.00 dues and his application was accepted despite Ciavaglia's protest that his entry be delayed until spring. At that time Roundtree was not pro-

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types of machinery; however, no skills were listed on his work record.

vided with either a green book or a copy of the union contract. He was also not informed of the hiring hall procedures, including the 2500 hour work requirement for union membership, although he was warned against operating any equipment without prior union approval.

At the time of his registration, Roundtree was employed by Tony DePaul for whom he had been working since 1960 as a laborer and truck driver. It was there that he gained experience handling operating engineers' equipment. However, after Roundtree became a registrant, DePaul requested the union to clear Roundtree for work as an operating engineer. This request was refused. Roundtree thereafter continued to work for DePaul in a non-operating engineering capacity until he was laid off in December 1972.

Despite his status as a green book registrant during the period between 1970 and 1976, Roundtree never once obtained work as an operating engineer—this despite the fact that he remained constantly available, tendered timely payments of his union fees (totaling $700.00) and pursued employment by regular calls and visits to the union. On one occasion, as late as January 1976, when he complained to Ciavaglia and Walsh about his lack of work, Roundtree was told that times were bad and many persons were without work. However, several months earlier, during a June 1975 visit to the District I hiring hall, Roundtree had discovered that he was not listed on the union out-of-work list. He complained at that time to Ciavaglia's assistant. Exhibits admitted at trial showed that his name did not appear on out-of-work lists from December 1973 through January 1975, but that on the Group III list for the combined months of January through June 1975, his name did appear in handwriting above the other typewritten names.

The cross examination of Roundtree focused on the issue whether Roundtree's name was omitted from the work list due to his failure to notify the union of his

change of address. Roundtree's testimony is that he did advise the union of the change of address in October 1972 when he paid his dues by mail (that notice was sent accompanying his dues book and payment). The union's position is that it did not receive notification until April 2, 1975 when Roundtree informed Ciavaglia of the change during a visit to the hall, as documented in his work record. The union thus inferentially attributes the omission of Roundtree's name from the list to his failure to respond to a letter of August 16, 1973. Roundtree, on the other hand, testified that he never received the August 1973 letter because it was not sent to his new address, and that the union had been notified of that change in October 1972. Roundtree supports his position by testimony that the union has continued to return his dues book to his new address with each subsequent payment he has made since October 1972.

(1) *Cleveland Allen*

Cleveland Allen accumulated six years experience operating heavy equipment while serving in the armed forces from April 1965 through March 1971. Following completion of a three month training program in the U.S. Corps of Engineers where he leraned to operate dozers, bulldozers, rubber tire pans, trench machines, and air compressors, Allen was sent as an operating engineer to Vietnam twice (and received three commendations there). He was also sent to the Korean DMZ, and assigned to several stateside engineering units working with civilian operating engineers. Soon after his discharge on March 24, 1971, he further supplemented his training by attending the Universal Construction School.

In June 1971 Allen was referred to Local 542 by a state employment office. At the hiring hall he spoke with William Ciavaglia who provided him with an apprenticeship application. Several weeks later he was notified by letter that he was to take the union's written and field examinations on August 28, 1971. Allen passed

both tests and became a green book registrant that day. He was never accepted in the apprenticeship program. His first job referral as a grader operator was with J. D. Morrissey on August 31, 1971. He testified that although he had worked satisfactorily as a grader operator for the first three weeks, he was unexplainably replaced by a white operator and reassigned to a lower paid roller position. On November 22, 1971 when he was laid off, he noted that the operator who had replaced him on the grader was still working. Allen also testified about his referral to the Industrial Construction Company as a grader on June 8, 1972. When he reported to work he was assigned to a lower paying roller position and, when he called to complain, was then told by Ciavaglia to keep it. Allen indicated that these switches occurred frequently in his experience.

Allen's last job working as an operating engineer was in October 1973 with Union Paving Co. Following that, he worked as a laborer for Buchtel Power Company at its Lynnewood Plant from August 27, 1974 through October 27, 1976 when he was laid off.[27] He once again contacted Local 542 in an attempt to get work, but was told by William Sautter that a Group II out-of-work registrant 700 Group I out-of-work operating engineers were ahead of him.

Allen testified that he had never refused a job from the union and had always been available for work as an operating engineer; that he had never been fired or suspended; and that he had always tendered timely payment-in-full of his union fees. In 1971 Allen worked 522 hours; in 1972, 689 hours; and in 1973, 575½ hours.

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[27] Working the 8:00 a.m.-4:30 p.m. shift, Allen reported that he observed Local 542 operating engineers on the job, numbering 85 to 100 men. Of that number, no more than 5, at any given time, were black—and they were working primarily as oilers, not operators.

(m) *Conclusion*

The above individual narrations reveal in varying degrees a pattern of delay or diversion either in acting upon or in entertaining minority applications for hiring hall status as well as a pattern of neglecting to advise these minority applicants or would-be applicants of the available methods of entry. Each of the above individuals had the requisite qualifications to obtain entry through at least one entry method. The resistance to entry of these individuals was not based upon a view that they lacked such qualifications. In most of the cases, years passed before any access was obtained, and once registrant or other hiring hall status was achieved, the referrals to operating engineer jobs were few. Some of the above individuals were replaced on the job by white operators without explanation or were deleted from the out-of-work list without cause.

I find the above narrations credible in their description of resistance to equal minority opportunity through the hiring hall. The testimony of Fox, Ahmad, Dent, Dukes, Iseley, Dodson, Hudson, Johnson, Benjamin, Roundtree, and Allen persuaded me that union officials acted deliberately to delay and resist applications, to fail to advise applicants of methods of entry and application procedures, and to fail in some instances to include on out-of-work lists those entitled to be listed. This conduct is consistent with the kind of deliberate resistance to minority participation shown by the deceptions contained in the Affirmative Action Program Agreement, replacing the Philadelphia Plan, and in the treatment of Benjamin Franklin trainees and other acts detailed above. This individual proof in turn supports the statistical and other proof of intentional discrimination (although such support is not here deemed essential) much as did the evidence in *Teamsters* that

> "[n]umerous qualified black and Spanish-surnamed American applicants who sought line driving jobs at the company over the years, either had their re-

quests ignored, were given false or misleading information about requirements, opportunities, and application procedures, or were not considered and hired on the same basis that whites were considered and hired." [*Teamsters*, 431 U.S. at 338, 97 S.Ct. at 1856 (quoting district court)].

In this case the individual minority applicants above were sometimes ignored in their efforts to apply and were given misleading or incomplete information about methods of entry. Although in most instances plaintiffs have not specifically shown that the resistance to entry or employment of these individuals was followed by specific instances of unresisted entry of white applicants in comparable positions, the evidence does show that there was a constant flow of entries into the union and into the registrant program during every year in question. Union or affiliated entrants viewed in general have been, disproportionately to the labor pool percentage, white entrants. In this respect the requirements of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), have been met, although they need not have been to have rendered the individual proof relevant. *Cf. Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978). This individual proof is not to be viewed out of the context of the other proof in this case and I repeat that its principal effect is to illustrate through individual instances how entry and participation of minority applicants (statistically and otherwise proven to have been intentionally discriminated against) was resisted by union officials.

I. Rebuttal

Plaintiff's suit involves claims of both a pattern of intentionally discriminatory treatment, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), and discriminatory disparate impact, *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Under

Title VII, and by analogy under § 1981 in the employment discrimination context plaintiff bears the burden of proof (persuasion) on the basic elements of his claims —(1) that intentional discrimination took place or (2) that some employment practice produced a disparate racial impact.

As to the claim of intentional discrimination particularly, plaintiff may establish his prima facie case by statistics alone, *see, e.g., Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), or by a combination of statistical and non-statistical proof. Plaintiff bears the burden of proving a prima facie case that a discriminatory policy actionable under Title VII or § 1981 exists. *Teamsters*, 431 U.S. at 360, 97 S.Ct. 1843. The burden then "shifts to the employer [or union] to *defeat* the prima facie showing of a pattern or practice *by demonstrating that the [plaintiff's] proof is either inaccurate or insignificant.*" *Id.* (emphasis added). It appears clearly that this shifting burden requires a defendant to persuade the court of inaccuracy or insignificance: if defendant produces no evidence, plaintiff necessarily prevails; if defendant produces some evidence, it must be forceful enough to persuade or once again plaintiff prevails.

The burden of proof issue is slightly different where only a disparate impact claim is being considered because in such a case the defenses may be different. A defendant may seek to demonstrate inaccuracies or defects in the calculation of disparities or he may seek to demonstrate that those disparities are permissible under Title VII because of "job relatedness," for instance. *E.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). In the latter circumstance the defendant bears the burden of persuading the court that there is "a manifest relationship to the employment in question." *Id.*

This somewhat complex structure is made much simpler in the circumstances of this case because the plain-

tiffs' case on a preponderance of the evidence, statistical and otherwise, is persuasive both that the union practiced a pattern of intentional discrimination and that union practices in the overall operation of a hiring hall for operating engineers created substantial racial disparities. Defendants' rebuttal, hence, has on the whole simply failed to render plaintiffs' proof unpersuasive and a *fortiori* has fallen short of disproving plaintiffs' case on a preponderance of the evidence standard. Some of the major features of defendants' rebuttal evidence will be summarized below.

1. *Experts Statistical Analysis*

a. *Labor Pool*

A basic aspect of the plaintiffs' statistical proof was the gross statistical disparity calculated by Dr. Siskin between the minority composition of the operating branches of 542 and the minority composition of the labor pool consisting of males between the ages of 18 and 65 within the jurisdictional reach of 542. Siskin found the labor pool to be 11.5% minority, whereas union minority composition, as of 1971, was 4.4%. Siskin found the disparity to be significant at below the 10^{-23} level.

Dr. Michael L. Wachter, one of the union's expert witnesses, is a Professor in the Department of Economics at the University of Pennsylvania. Dr. Wachter is described in Local 542's Brief as a labor economist. It was his opinion that the labor pool of minority individuals should be defined much more restrictively than Siskin defined it.

Wachter in essence believed that there were numerous factors (cultural, socioeconomic, religious, vocational, educational, etc.) which would render inaccurate a calculation of labor pool based simply on the number of male minority individuals aged 18-65. Wachter theorized that these factors may tend to make minority individuals, for

whatever reasons, less likely to possess skills needed to enter the union, to succeed in the union, or to be oriented in the first place toward operating engineer work, etc. Wachter, however, provided no analysis which sought to quantify the effects of these factors. He plainly did not offer any evidence that minority individuals disproportionately lacked the skills or availability to do operating engineer work.

Apart from Wachter's failure to give the court an indication of the strength of the effects of the factors he referred to, there is other evidence in this case indicating that his hypothesis is in error. Wachter's argument, synthesized, is that assuming *arguendo* that the union practiced no discrimination against minorities, the minority membership in the union may still be much less than 11.5%.[28] This, his theory goes, might be due to pre-labor market factors such as an inability of minority applicants to gain admittance for lack of qualifications or a lack of motivation to seek operating engineer work.

With respect to his hypothesized lack of skills among minorities, it must be pointed out that there have been and to some extent still are entry methods requiring no prior skill or level of educational attainment. Indeed, only the RA program, recently, has required a high school diploma. The A registrant program required no skill or experience. An A registrant could progress to union status by accumulating hours in essentially unskilled areas. The evidence also indicates that the B registrant program which required operating engineer experience and, after 1970, required testing has held a greater percentage of minority individuals than did the A registrant program. And it is to the B registrant program which elsewhere in his report Dr. Wachter himself points

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[28] There is, of course, no legal requirement that representation in the union be precisely proportionate to the labor pool representation. The evidence in this case indicates in general a gross statistical disparity which shows intentional discrimination but which is not of its nature irrefutable.

for the conclusion that minority individuals are represented in relatively high percentages and tend to be more successful in reaching membership status. The C and D branch organization and C miscellaneous methods themselves require no particular skill or experience to do operating engineer work, and transfer from these branches to the operating branches can be effected. Certainly unauthorized methods of direct entry require no level of skill or experience; and the RA program, once it was extended to those who were not union members, was particularly directed at unskilled A registrants. Given the existence of these entry avenues, one might reasonably expect that societal deprivations bearing upon skills, if evidence showed their existence, would over time have no effect or little effect on composition.

To the extent that Dr. Wachter theorized that the actual number of available minority applicants is less than Siskin's estimate because of a lack of minority motivation, disposition, or orientation toward operating engineer work, he is contradicted by the numbers of minority applicants to the RA program, particularly in 1969 and after 1972 when federal regulations required examination of minority underutilization. The percentage of minority applicants typically exceeded the 11.9% minority goal which the JATC itself established in fulfillment of its obligation to calculate the labor pool.[29]

Siskin's 11.5% minority labor pool definition for the above reasons withstands Dr. Wachter's criticisms. More importantly, in the absence of any proof that in fact there is a relative lack of skill among minorities to become operating engineers a reduction of the labor pool size is wholly inappropriate.[30] Further, given strong in-

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[29] Wachter states in his report (Union's Exhibit 428 at 46-47): "It is clear that on average the percentage of minority applicants to the [RA] system far exceeds the minority representation in the community."

[30] Wachter, of course, does not specify any particular percentage by which he theorizes the labor pool should be reduced for any of

dications that particular levels of formal education are not necessary for effective performance of operating engineer tasks, to impose an educational qualification on the labor pool definition would not only contradict the facts, but would indirectly insert into plaintiffs' analysis a non-validated qualificational standard which, by Wachter's theory, could have the effect of disproportionately excluding minority individuals from the composition of that labor pool. This in itself seems impermissible absent any concrete evidence.[31] It is intriguing to note that Dr. Wachter suggests that the black labor pool should be

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the above factors. Furthermore, the abilities needed for purposes of general entry at low priority levels are of the sort that "many persons possess or can fairly readily acquire." *Hazelwood*, 97 S.Ct. at 2742 n.13. This is not to say that all persons who enter are unskilled, but that numerous entry routes have existed during times pertinent here (or still exist, though they have recently been reduced) which do not require any level of skill as an operating engineer. The gross disparities in membership create an inference of purposeful discrimination. That is supplemented in this case with non-statistical proof as indicated above and with other statistical proof which favors the inference created by the original membership disparity. In the course of time, given the eixstence of numerous unskilled entry methods, even if there were the slightest evidence that minority individuals were disproportionately unskilled to work as operating engineers, one would expect the percentages to adjust themselves to Siskin's labor pool calculation, absent discrimination, so that such a gross disparity would not exist.

[31] While I do not disagree with Dr. Siskin's alternative 13.9% minority labor pool figure (reducing total labor pool by eliminating those who have a greater than high school education), I have not relied upon that 13.9% figure in the analysis of plaintiffs' case. Instead, I have used the conservative 11.5% measure. (Most of plaintiffs computations were based on this figure.) The 13.9% figure, however, seems realistic in the sense that because of a generally lower formal educational attainment among minorities, the proportion of the minorities available for and interested in operating engineer work may be greater than that of whites who because of proportionately greater formal educational attainments might have additional opportunities.

smaller for the purposes of this suit because percentage-wise fewer blacks have high school degrees, yet he seems oblivious to the fact that all of the members of the union's Executive Committee had failed to complete high school. Bluntly, Local 542 is not seeking to train applicants for the faculty in the Department of Economics at the University of Pennsylvania, and Dr. Wachter's restriction of the black labor pool fails to pass even a common sense standard or one grounded on a rational statistical method. Wachter's assertion that the lack of educational qualifications is a signal of a lower level of operating engineer related skills is unsupported. Upon any comparison, the testimony of Dr. Siskin was far more credible and persuasive than Dr. Wachter's on this issue.

There are a few other theoretical factors mentioned by Dr. Wachter as bearing upon labor pool definition. Defendant Local 542 has chosen in its brief, however, to discuss only those addressed above. These additional factors will be noted only briefly. Wachter asserts that the geographical consideration of the labor pool cannot be limited to 542's jurisdiction, that the intermittent nature of the work limits the numbers of those willing to be operating engineers, and that becoming an operating engineer is a matter of self-selection and individual choice. These theoretical assertions do not alter my view of Siskin's labor pool analysis. Suffice to say that Wachter does not cite to any evidentiary material at all to suggest that these are in any way significant factors which would disproportionately affect the minority labor pool.

Dr. Wachter, in addition to speculating about the above factors (including education and prior training or skill), has referred to several other considerations whose effects he sought to calculate. Specifically, he sought to quantify the effects of considering "labor force" (rather than simply the population of minority males between the ages of 18 and 65), possession of an automobile and telephone, and the residential pattern of current members.

Wachter concludes that it makes no sense to consider persons in the minority labor pool as defined by Siskin who are not available for work. Thus he limits the labor pool to those in the "labor force," excluding the persons identified in the Census Bureau Statistics as not actively seeking employment and thereby reducing the minority composition of the labor pool to 10.1%. There is much superficial logic in this reasoning; however, Dr. Wachter is not precise as to the reasons why someone may not be in the labor force. It is possible that some of those not actively seeking employment are discouraged by the unavailability of work or by what they might perceive to be discrimination in some areas of employment. (Dr. Wachter himself referred to high unemployment in explaining the high rate of minority applicants to the registrant program in 1970-1973.) A greater percentage of this group may be minority individuals. If jobs were to become available, this segment might well become a work force segment even in Wachter's terms. The crucial point is that it simply cannot be said from Wachter's analysis, insofar as it was developed, that there would result a *disproportionate* diminishing effect on the minority labor pool, considering both the labor force figures and that segment which would join the labor force if jobs were available. Given the limited extent of the proof and its arguable nature, I reject the labor force reduction which Wachter suggests. Wachter's arguments provide a tangible basis for seriously questioning the appropriateness of Siskin's labor pool definition.

Wachter further proposed that the minority labor pool be reduced by eliminating those who do not possess an automobile or a telephone. An automobile, Wachter maintains, is a practical necessity for an operating engineer. Likewise, he believes a telephone is essential for participation in the union's referral system. Wachter is correct to the extent that a phone and an automobile could be and probably would be useful to an operating engineer. But in practical terms his analysis obscures an important

reality. Common sense dictates that there are many alternatives to possession of an automobile or telephone. There are other methods of communication of referrals from the hiring hall, such as, communication through a friend or visiting the hiring hall once a job is completed or, perhaps simplest of all, obtaining a telephone. Likewise, an automobile can be borrowed, friends or relatives may provide transportation, possibly other forms of transportation may be used, or an automobile may even be purchased after entry to the hiring hall is achieved. In short, Wachter's analysis on these points seem simplistic, absolutizing characteristics which can be altered or adapted with relative ease. It seems patently improper therefore to use such characteristics to rule out employment through the union or define a labor pool on that theory. Indeed, the union itself does not require possession of an automobile or phone.

Wachter's final empirical adjustment of the minority labor pool is based upon what he perceives as an appropriate alternative method of calculating that pool. Wachter suggests the minority labor pool can be defined by determining the residential patterns of current members "to define the expected number of minorities to come from each area." Wachter's use of this approach creates grave doubt whether he understands the purpose of statistical evidence in an employment discrimination case and causes me to question further the reliability of his conclusions. It is hard to imagine that an expert witness seeking to determine the percentage of the labor pool composed of minority individuals in the context of a suit alleging purposeful discrimination (particularly in membership) would ever seek to define that labor pool by the characteristics of current members. Such an analysis obviously tends to beg the question raised by this suit and must therefore be rejected.[32]

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[32] Dr. Wachter has also stated that "In no case should a finding of [statistical] under-representation alone be taken as proof of discrimination." This underlying view is at odds with the Court's

Two other experts made comments critical of Siskin's labor pool calculations. They are Dr. Lewis J. Perl, expert for defendant Glasgow, Associations and contractors, and Dr. Arthur P. Dempster, another expert witness for Local 542. Dr. Perl is Vice President of National Economic Research Associates, Inc., and Dr. Dempster is a professor in the Department of Statistics at Harvard University who has been Chairman of that Department, based on a rotating appointment system. Dr. Perl taught economics at the New York School of Industrial and Labor Relations at Cornell University and has had experience in various areas of economic labor analysis. Dr. Dempster's specific area of concentration within the field of statistics is mathematical statistics.

Dr. Perl's basic criticisms repeat some of the criticisms of Dr. Wachter. They are therefore subject to the preceding analysis. I will, however, catalog Dr. Perl's criticisms separately.

While Dr. Perl agrees that in general, despite some minor discrepancies, Dr. Siskin's calculation of the percentage of minority membership in the union is accurate, he disputes the minority labor pool percentage of 11.5% by proposing reductions through adjustments according to "labor force," automobile and telephone ownership, educational achievement, and acquisition of skills. Perl also criticizes the temporal limitations of Siskin's labor pool estimate. For the reasons earlier expressed, the labor force reduction must be rejected.

Unlike Wachter, Perl states explicitly that some number of those who are not in the labor force may consist of persons who are simply not interested in seeking work. In the absence of further evidence, as was said before, it is possible that this group is disproportionately minority

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conclusion in *Hazelwood* that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Id.* 97 S.Ct. at 2741. I therefore must also reject this too-broadly stated view.

and that its interest in seeking employment may be renewed if employment became available. Failure to try to sort out the group of uninterested workers makes Perl's reduction speculative. Little time need be spent on the automobile and telephone ownership factors. Perl does not state that they are absolute necessities but only that participation in the hiring hall "probably requires" or "may require" these instrumentalities. For the reasons expressed above these factors are likewise rejected.

Concerning his conclusion that educational qualifications should be used to define the minority labor pool, Perl cites to the 22.3% black failure rate on the Bureau of Employment Security aptitude test administered by the JATC. This, Perl states, is "nearly twice as high as the rate for whites." Perl then states "if we were to *assume* similar disparities in educational qualifications between blacks and whites . . ." more generally, the minority labor pool would be considerably reduced.[33] Significantly, Perl did not say that such an assumption was in fact warranted. Moreover, the BES test, which he stated, matter of factly, as having been "validated," is found in this decision not to have been validated.

Perl's suggestion that acquisition of skills outside the union is a factor to be considered in calculating the racial composition of the labor pool fails to consider the existence of unskilled entry routes throughout the relevant time period. Further, Perl, like Wachter, points to no evidence that minorities are disproportionately unskilled for operating engineer work.

As a separate point, Dr. Perl raises the question of the propriety of looking to any static figure representing the minority labor pool at any given time because the composition of the union has developed over a period of years. Consistent with the usual approach of Dr. Wachter, Dr. Perl declines to develop any substitute statistical measure or to indicate whether such a measure would dispropor-

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[33] Contractor's Exhibit 6 at 6 (emphasis added).

tionately affect minority labor pool composition. I believe the measure chosen from the most recent census data is an effective one for purposes of generating a (rebuttable) statistical conclusion. Speculation is not effective rebuttal. And although Dr. Perl observed that the entry rate of minorities in the period 1966-1971 was a better focus for comparison with a labor pool figure, he made no effort to calculate the results of that comparison.[34] In fact Dr. Siskin's evaluation of this entry data, discussed *supra*, indicates on the average a 6.4% minority entry rate during these years. This is statistically significant at below 1 in one million and in context supports the existence of discrimination, not its absence.

Finally, Dr. Dempster, testifying on behalf of Local 542, has chosen expressly to leave for the other experts the task of analyzing Siskin's labor pool calculation in detail. However, he has voiced a general view that the general community was not a valid source for comparison, and points out that defining the labor pool may be impossible. I disagree with Dr. Dempster's general conclusion in the circumstances of this case.

It is clear that the defendants believed it sufficient principally to raise theoretical questions about the value of Dr. Siskin's analysis and in most instances chose to do no more. With the burden on defendants to "defeat" plaintiffs' prima facie case by demonstrating inaccuracies or insignificance, this is patently insufficient. But apart from the burden of proof question (for this is *not* a case in which the evidence is at an equilibrium) defendants have simply not raised any tangible or credible reason why Siskin's labor pool estimate should be viewed as anything less than persuasive. In light of the preponderance of the evidence standard in this case, I find in favor of the conclusions of Dr. Siskin, whose credibility has not been undermined.

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[34] Such a comparison does, of course, provide a possible avenue for rebuttal evidence as is explained in *Hazelwood*.

b. *Features of Entry*

Dr. Wachter, beyond his conclusions as to the size of the minority labor pool, was also of the opinion that the statistical evidence relating to entry and entry methods failed to reveal discrimination. I will summarize Wachter's major points on this subject.

First, Wachter takes issue with a projection by Siskin that by year 2001 minority membership would be only 7.2%. This projection was based on the trend, as Siskin calculated it, from data for the years 1969-1971. Siskin also determined, based on his calculation of the trend from data for the period 1966-71, that by the year 2001 minority composition would be 6.7%. Wachter emphasizes the unreliability of such projections as actual indicia of future composition. Wachter is, in my view, entirely correct, but he has missed the point. Siskin was not offering the projections to predict the future or to suggest that the real legal goal was to attain an exact parity in minority and white composition. Siskin qualified his projections by making them *contingent* upon the continuation of the same average minority entry rate and union growth rate as those for the periods 1966-71 and 1969-71. The real point is that Siskin was not saying what the future will be like, but was offering a way of looking at the evidence for the 1966-71 and 1969-71 periods. The "projections" thus serve only to describe the effect of entry on composition within the years 1966-1971 and certainly have no actual predictive value.

Wachter also criticizes as statistically insignificant Siskin's determinations that the hours and wages of minority RAs were less than those for white RAs. Siskin's analysis itself did not establish significance statistically on the relative hours and wages of each class. The only statistical significance was in the *pattern* of diminished hours and wages for minority RAs. This significance was at below the .05 level, the basic level at which significance begins. The statistical analysis is, however, the least im-

portant aspect of this evidence on diminished hours and wages among RAs. Although such a statistical conclusion would not in itself permit an inference of any discriminatory cause, given the other proof in this case the existence of those average disparities is meaningfully consistent with the claim of discrimination.

Turning to Siskin's analysis of the registrant program, Wachter asserts that BF graduates must not be excluded from consideration of total registrants. Although the union bears no responsibility for the development of the BF programs (and despite the unfulfilled assurances by union official Al Holland in the recruitment process), BF graduates did become B registrants and therefore must certainly be counted as such. (The occurrence of BF programs must, however, be viewed as a unique experience.) In part due to this inclusion, the post-1969 data on entries to the registrant program does not indicate discrimination when viewed alone. The 1966-1969 figures, which according to Siskin show a much lower rate of entry by minorities (significant at below the .01 level), are, Wachter complains, based on estimates of minority membership. Wachter does not specifically criticize their accuracy as estimates. Dr. Siskin's Report 2, p. 17-18 (Plaintiffs' Exhibit 168), fails to mention whether these calculations are estimates or, if they are, on what they are based.

With regard to Wachter's criticism of Siskin's calculation that the hours and wages of minority BF graduates were lower on average than those of white graduates, it must be pointed out that Siskin himself drew no statistically significant conclusions. The disparity, however, exists in real terms and hence corroborates the fabric of other proof in this case. Despite Wachter's theory that a difference of skills between BF white graduates and BF minority graduates may explain the disparities, there is no evidence to suggest that the skills among this group of co-trainees are unequal. The suggestion simply is un-

substantiated by evidence. Inasmuch as Wachter himself points out that the rate of attaining union membership from the registrant program is slightly *higher* for minority operating engineers, the bald assertion that minority graduates of the BF programs might be less skilled is rendered even more suspect.[35]

Criticisms by Wachter that Siskin has failed, in addition to his other argued failures, to show the mechanism by which entry discrimination was accomplished are entirely misplaced. Siskin testified that he was not capable of drawing a conclusion from the statistics that legal discrimination occurred. That conclusion is properly left for the court. In providing statistical analysis, Siskin established an evidentiary base supporting the inference of discrimination and playing an important role in the achievement of plaintiffs' prima facie case. Siskin's expert testimony must not, however, be viewed alone. Nor is it legally necessary in establishing a prima facie statistical case that plaintiffs also explain some mechanism by which the inferred purposeful discrimination took place. Discrimination is no less illegal because it may be covert. In this case there is evidence to indicate that would-be minority operating engineers have been discouraged or prevented from filing applications and that they have not fully been advised of the variety of entry mechanisms upon inquiry. In total, plaintiffs' proof more than adequately establishes those elements necessary to support the inference of intentional discrimination.

Dr. Wachter gives an interesting response to Siskin's observation that the RA entrants represent a relatively

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[35] Wachter points to the relative equality in the percentage of minority and white entrants into the union from the registrant program as demonstrating that no referral discrimination occurred. Apart from Wachter's selectivity about when to bring up this relative equality of entry, in the absence of evidence of the reasons for the disproportionately large number of withdrawals by whites from the registrant program, no such inference seems appropriate.

small part of union entrants. Wachter's response (which does not really direct itself to the issue of discrimination in membership, referral, and entry) is posed rhetorically:

> The question is what should the union do differently? First, if the Union stopped its efforts at unionizing new workers, registered apprentices as a percentage of total new entrants would rise dramatically. No new jobs would be created, no additional minority workers would be hired, but the Union's statistics would look better to Dr. Siskin. Alternatively or in addition, the Union could scrap the registrant system. This would also improve the relative importance of the registered apprenticeship program. [Union's Exhibit 428 at 66-67]

There is certainly no obligation on the union's part to forego any entry methods which do not in themselves discriminate or participate in overall discrimination. Doing so would not change the issues of liability. There is an inflexible duty not to discriminate. And in that respect the recent minority entry figures for the RA program are properly viewed in contrast not only to an array of other entry methods but also to the earlier RA experience. If it was Dr. Wachter's intent to recommend a serious response to the evidence of discrimination in this case he has fallen short of his purpose.

c. *Hours and Wages*

In order to present the defendants' criticism of Dr. Siskin's determination of significant disparities in the hours worked and wages obtained between white and minority union member operating engineers, I will consider what I view to be the major observations of each of the defendants' three expert witnesses. It must be remembered, preliminarily, that Siskin's conclusions stem from two separate studies, the first covering the years 1969-1971, the second covering 1972. Both studies included re-

gression analyses seeking to equalize the factors of age, group list, seniority, branch and district.[36]

i. *Dr. Wachter*

Dr. Wachter disputes Siskin's analysis of hours and wages, characterizing it as misleading. He did not, however, perform any duplicative study which might suggest a different result. He does not dispute the appropriateness of regression analysis in general as a way of isolating a disparate racial effect in hours and wages.

Among his foremost objections is the claimed impossibility of testing the accuracy of calculations because the individual effects of the specific variables Siskin considered are not fully presented in his report. He also complains of the difficulty created by Siskin's failure to indicate standard errors. (The standard errors would be used to determine confidence intervals indicating the strength of the conclusions as to race effects.) In a similar vein Wachter levels a general criticism that he did not have available to him the regression analyses which he assumes were used to develop the regression which Siskin ultimately reported.

Wachter also disputes Siskin's conclusion that, in part because of the high significance level of the regression, the appropriateness of a "linear" model is confirmed. Siskin used such a model as a method of equalizing the variables of age, branch, district, out-of-work list, and seniority. And Wachter questions the failure to add other variables, particularly the variables of skill (ability on machines), pre-labor market lack of endowment, and the self-selectional aspect of acceptance or refusal of referral.

Wachter's criticism relating to the failure to provide underlying data is not a criticism of Siskin's conclusions or of his analysis, but of the difficulty with which Wach-

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[36] The 1969-71 study estimated the out-of-work list groupings. The estimates treated whites and minorities in like categories of hours worked.

ter was presented in attempting to parse it. Because Dr. Wachter had considerable information on Siskin's mode of analysis he was certainly not left defenseless to seek to attack it. Indeed, he had full opportunity to attempt a reproduction of Siskin's work if he thought there was an underlying defect. This he chose not to do.

With respect to the selection of a linear model, Siskin in his Report No. 7, p. 20-21 (Plaintiffs' Exhibit 168), observed:

> It is my belief based on experience and analysis of regression techniques, that a linear model is adequate to calculate a race effect, and that adding non-linear terms and interactions would rarely produce a downward change in the race effect.

In addition Siskin concluded that a non-linear regression would be inappropriate. He did, however, run a non-linear model and achieve results comparable to his previous linear regressions. Siskin's statement that the significance of the linear regression could confirm the appropriateness of a linear model was not an unqualified one. He observed:

> [The] assumption [of linearity] is . . . tested by the overall statistical significance of the regression. Using the standard computer program, I found that the statistical significance of the overall regression is at well below the .0001 level. This *tends to* confirm the assumption of linearity, *i.e.*, that there is a linear aspect to the relationship between the hours worked and the variables in question. [Emphasis supplied.

Overall significance, as I understand, does not itself prove the linearity assumption.

Wachter's remaining contention seems more serious. Siskin did decline to include the factor of skill in his 1969-71 regression. This could have an effect on the ultimate result of the regression if skill was indeed a significant

factor affecting hours and wages and if it varied to some extent according to race. I have rejected the use of the skills factor as a theoretical basis for calculating labor pool; but it may be a slightly different question whether skills are appropriate for consideration in the regression studies. Nevertheless, there is evidence to indicate that referrals based on skill were not frequent. There is no evidence at all to indicate that skills vary by race, or that they are not fully accounted for by the age, seniority, work list, branch and district factors. Siskin based his exclusion of skills additionally upon his view that the union data on skills were "totally unreliable." An analysis of the union records demonstrates that even the union hiring hall agents did not consider skills listed on the work records (the first page) as accurate. Time and time again there was testimony that hundreds of persons were assigned to jobs that required skills which were not noted on their records. As to the skills of the members, the testimony demonstrates the pervasive inaccuracy of the union records. Yet Dr. Wachter complains about the failure of Dr. Siskin to consider skill data which was never available in any accurate form and which his client made no attempt to correct so that Dr. Wachter could by empirical study substantiate his thesis. Further, to the extent skills may be expected to develop from experience on the job, discrimination revealed by hours disparities may have a direct effect on level of skill thus possibly rendering such a consideration inappropriate as a factor by which the racial effect might be reduced.

Given the absence of evidence as to whether skill is variable according to race, the consideration by Siskin of factors which on their face should account for skill, and the serious doubts created about the importance of skilled referrals, it is my belief that Siskin's exclusion of that factor does not undermine the value of his determination of a significant hours and wages disparity.

ii. *Dr. Perl*

Dr. Perl is much more cautious and analytical about his conclusions on the hours and wages disparity than was Wachter. He repeats a number of Wachter's criticisms, and concludes with an overall, but qualified, negative view of Siskin's appraisal.

Perl, too, focuses on potential variables which Siskin did not include when he sought to equalize non-racial factors affecting hours and wages. In particular Perl would have added skill to the equation. He observed: "if skill is left out of the Siskin regression, if blacks are less skilled than whites and if skill positively relates to hours of employment, the apparent race effect [arrived at by Siskin] will measure differences in hours that are, in fact, attributable to skill." Contractors' Exhibit 6 at 10. Perl would also add to the regressions the factors of willingness to travel, the extent to which jobs are refused, and the initial method of entry. These factors, he believes, while not the only appropriate ones, must be considered before any conclusion about race effect can be drawn. I find that the failure of Siskin to use these factors in the regression analysis was not inappropriate.

With respect to the skill factor, Perl himself has great difficulty arriving at a basis for measurement. Ultimately he relies on a sample skill survey conducted by the union of members to determine their number of skills on pieces of equipment. The information he uses is based on self-assessment of skills. Apart from the arguability of the results of any such self-assessment, Perl like Wachter fails to consider a basic factor which tends to make skill, as he defined it, an inappropriate consideration having no permissible potential for reducing the race effect; if indeed discrimination in hours and wages exists, those persons discriminated against might tend to have developed experience on a smaller variety of equipment. Hence, the skills factor used by Perl is not a factor which necessarily precedes union discrimination and is not necessarily

associated to race in pre-entry manner. Furthermore, Perl himself states that "the skill variables which are used in this analysis are extremely simplistic measures and do not provide an objective appraisal of the level of employees skill." Contractors' Exhibit 6 at 15. In replicating Dr. Siskin's linear regression, Perl determined that the skills factor (apparently assuming that this factor did not itself stem from discrimination) worked a reduction of the hours disparity by eight hours.

The willingness to travel factor which Perl thought appropriate for inclusion in the regression analysis was also added to Perl's regression. Given the sequence in which Perl considered it, this factor resulted a six hour reduction in the hours disparity. However, Perl's definition of willingness to travel seems artificial. He stated that "36 percent of blacks said they would take employment outside their own district as compared with 60 percent of whites." Contractors' Exhibit 6 at 14. This wholly ignores the fact that a large percentage of all minority members of Local 542 are heavily concentrated in the most populous and potentially the busiest District I. The white population of Local 542 is more evenly distributed. Perl hence apparently failed to differentiate the district by district effect on the willingness to travel. There is simply no reasonable support for the inclusion of this factor.

Perl also tried to account for method of entry in the regression, and hence reduced the race effect by three hours. Perl does not, however, discuss why method of entry is particularly different from branch location, a factor which Siskin considered. This could be an important consideration, unless Perl is really trying to ascertain pre-labor market "underendowment of skills," a factor previously rejected.

In his regression Perl sought also to incorporate consideration of refusals of referrals. Use of this factor risks a mismeasurement because of possible differences in

quality of jobs offered in referrals which could be related to discrimination. Perl does not state specifically the effect of this factor as he used it, but combines it with "interaction terms" to reduce the race effect by eleven additional hours to a 79 hour figure. Perl then suggests that there may be still other variables. His ultimate conclusion is that

> "[a]ll we can reasonably conclude from these regression results is that blacks work fewer hours than whites. Whether this reflects differences in skill, availability or, as Siskin asserts, employee discrimination is impossible to determine from the results above." [Contractors' Exhibit 6 at 16]

The factors which Perl sought to add to the Siskin regression analysis were not shown by any evidence to be factors which are definite, significant or, even if definite and significant, separable from the discrimination alleged in this case. In any event, the reductions for skill, refusals, willingness to travel, entry method and "interaction terms" reduced the disparity from 109 hours to 79 hours. The disparity was not eliminated, and Perl acknowledged its existence based on the regression. Perl's testimony and analysis do not provide, in my judgment, any firm basis for rejecting Siskin's conclusions. I therefore maintain my view, on a preponderance of the evidence, of the validity of Siskin's hours and wages conclusions.

iii. *Dr. Dempster*

Dr. Dempster's criticisms of Siskin's hours and wages analysis are much like those of Perl and Wachter. They are stated in general terms and rely principally on speculations about possible effects of factors which Siskin did not directly include in his regression. Significantly, Dempster provided no replication of Siskin's analysis although he said that other analyses could be performed "cheaply" and "easily" and although he said that he might perform them.

Among Dempster's principal criticisms are several which have been considered above. He stated that Siskin's conclusion of a racially based disparity may have overlooked other considerations which, if included in the regression, might have reduced the race effect. He stated that the assumption of linearity was mistaken. I will not address these issues any further. Somewhat different in kind from the above assertions, however, is Dempster's opinion that racial effect could not be attributed causally to discrimination. He does, however, acknowledge the existence of a racial disparity. He also adds that a prospective experimental study, by analogy to statistical evaluation of medical treatments, is the only kind of study which can support with any assurance a causal inference.

The suggestion of a controlled experimental test for discrimination reflects Dempster's experience with the use of statistics in medical research. Dr. Dempster hence disputes the appropriateness of retrospective statistical studies *in general*. While this may be a meaningful criticism in some areas of medical research, it is not meaningful or realistic in the setting of an employment discrimination case. (Nor is it consistent with the use of retrospective statistical analyses in *Teamsters*, *supra*, and *Hazelwood*, *supra*.) It is simply not feasible in a case such as this to construct a controlled experiment designed to test a discrimination hypothesis during some future period. I am also persuaded that it is not necessary.

As a whole, Dr. Dempster's criticisms do not undermine, in my view, the essential persuasiveness and significance of Dr. Siskin's hours and wages analysis.

d. *Conclusion*

Based on the foregoing illustrative discussion of the opinions of Drs. Wachter, Perl and Dempster, and based upon their reports and testimony as a whole, I remain persuaded by Dr. Siskin's analysis and credit his conclusions and credibility.

2. *Other Rebuttal of Defendants*

In its post-trial brief defendant 542 has enumerated a great many arguments and opinions of Homer Dawson, Local Union President, seeking essentially to undercut the statistical analysis of Dr. Siskin. On the whole I do not credit Dawson's testimony. His layman's approach to statistics suffers seriously from a lack of understanding of even the basic statistical methods used by Dr. Siskin. Suffice it to say that Dawson has not succeeded in reducing the probative value of Siskin's conclusions or in obscuring the issues. The assertion that based on Dawson's testimony errors of fact and mistaken assumptions rendered Siskin's analysis unreliable is rejected.

Local 542 has also listed in its brief a number of circumstances which it asserts rebuts any inference of discrimination. Among these assertions are the following: that in referrals whites bypassed other whites as well as blacks; that blacks on some occasions bypassed whites; that minority individuals used Miscellaneous entry and Organization entry and in a few instances unauthorized entry; that many minorities in the union are related; that minorities including the named plaintiffs and plaintiffs' witnesses received preferences in referrals; that whites also received short term job referrals; and that whites and blacks entered the union in the same ways.

These assertions suffer from a very significant defect. When considered closely, they are not basically inconsistent with plaintiffs' allegations of discrimination. The fact that referrals sometimes involved whites bypassing whites as well as blacks or some blacks bypassing some whites does nothing to contradict the overall disparities which plaintiffs' proof addressed and which have not been explained. Indeed, this practice only confirms that the referral system was not bona fide in structure. The fact that minority union members may have received a higher percentage of referrals in some years than their percentage in the union only makes more conspicuous the

disparities in hours and wages. Calculating referrals as such does nothing, after all, to distinguish between short term, undesirable jobs and desirable ones. Nor does the fact that some whites received short term jobs provide any meaningful suggestion that the statistical disparities and other evidence of discrimination are incorrect. As to entry by minority members, plaintiffs never alleged the kinds of exclusively segregative practices which would be immediately identifiable, but instead plaintiffs alleged a slightly more subtle channeling of most of those minority individuals who did enter the union.

Similarly the existence of some cases of unauthorized minority entry or the suggestions of minority nepotism are insignificant given the total evidentiary picture including the overall gross statistical racial disparities. The decline of overall hours worked by operating engineers, furthermore, does nothing to explain these substantial and overall continuing comparative disparities.

The union procedures in general constituted a motley fabric of arbitrary departures from the rules. I do not find that union's intentional discrimination was practiced in such a way as to exclude absolutely all minorities from entry or to deny absolutely all minorities from the benefits of employment. The gross disparities and other evidence are nevertheless persuasive that the union practiced intentional discrimination.

J. *The Case Against JATC*

Plaintiffs have also complained of discrimination against minority individuals in the selection of persons for the Registered Apprenticeship program. This program is run jointly by the contractors and the union through a Joint Apprenticeship Training Committee headed by Robert Emrick, a former member of Local 542's Executive Board and once an operating engineer. The RA program involves four years of both classes and on-the-job training. Apprentices begin as oilers in a Group

I out-of-work list. This priority listing itself makes RA status desirable.

As determined by Dr. Siskin, between 1966 and 1971 there were an average of 4.39% minority entrants into the RA program. These entrants were selected from 2771 applicants, 321 (11.6%) of whom were minority members. The statistical significance of the disparity based on the average over the six years was determined by Siskin to be at below the one in one million level in comparison with the minority labor pool. The average percentage of minority graduates for this period, as indicated earlier in the discussion of entry discrimination was 1.8%. This was determined to be significant at below the one in one billion level when compared with the minority labor pool, and is far less than minority union representation. From 1972 on the minority entry data shows significant increases.

The standards for admission to the RA program were essentially modeled on the national standards developed by the National Joint Apprenticeship Training Committee. These national standards, as relevant here, imposed age restrictions (between 18-25 years); an ability requirement; and a twelfth grade educational qualification. The defendant JATC adopted the age and education requirement (either giving preference to or requiring a high school diploma of RA applicants) and instituted a written testing procedure as set out below. Although Homer Dawson, the local union's president, testified that the Department of Labor approved the local standards, this testimony was permitted pending documentation; that documentation was never presented.

At first the union expected to select current members of A branch (oilers) based on seniority and without discrimination. The seniority standard was approved by the Department of Labor. Emrick wrote to the Department of Labor stating that if applicants were to be selected beyond the pool of 650 oilers, then procedures in accord with state regulations on discrimination in such pro-

grams would be developed. The approval of the Department of Labor was thus circumscribed. The standard ultimately adopted by the union, as revealed in the minutes of a JATC meeting, was a blend of "previous experience and qualifications."

In the first year, 1966, four classes of RAs were chosen. The third and fourth year classes were chosen from A branch, and the first and second from A-registrants (nonmembers). Mr. Dawson testified that A-branch entrants were placed in the RA program, but were not RAs. The union, in evaluating entrants who were A-registrants, assigned point scores in five areas: educational background, age, test scores, on-the-job experience and interview results. Of particular note, one point (of a possible 20) was to be deducted for each year short of 12 high school years and for each year in excess of age 25. A minimum score of 70 was established. The written tests employed were the Department of Navy Equipment Operators' Exam, and a mathematical and verbal test. A-branch members were exempt from all the above specific requirements, except possibly the Navy test.

In 1967, the Navy test was replaced with tests from the Psychological Corporation. In 1968 the Bureau of Employment Security test ("BES") was used and the high school education requirement and the age requirements were made inflexible minimum qualifications. Another test, a JATC test, was administered to those meeting all other standards. (Notably the national standards did not require any particular test, nor did they require an interview.)

These were the procedures which were supposed to be followed until changes in 1972 pursuant to federal regulations requiring RA programs to measure minority participation. 29 C.F.R. § 30.4(d)(1) (1972). Although the local JATC, along with the national JATC, objected to such regulations, they proceeded to analyze their minority situation. The JATC determined, doubtless from the

standards set forth in subsection "e" which included labor market representation, that the percentage of minority entrants they were obliged to achieve was 11.9% of total entrants (not far from Siskin's determination of 11.5%) and the committee set its selection goals accordingly. In 1972, 1973, 1974 and 1976 (no class entered in 1975) minorities entered the RA program at a rate commensurate with or in excess of their representation in the relevant demographic labor pool.

The data on minority entries into the RA program has been set out above in the discussion of statistical evidence of entry discrimination. It will not be recounted here. With respect to JATC selection between 1966 and 1968, as detailed previously there were specific instances of disparate treatment of minorities. John Dent and Willie Rush both were rejected allegedly because they were B-registrants although some white B-registrants were accepted; Robert Ahmad was rejected for failing to appear for an interview although he received no notice of the interview; and Eugene Cobbs was rejected ostensibly because he was overage at 45, although in at least one instance an even older white applicant, Clifton Killinger, was admitted and although as a union member Cobbs was not supposed to be subject to the age limitation.

Between 1966 and 1968 the principal reason for rejection of minority applicants to the RA program was that they "applied in error." Forty-one percent of the minority applicants were rejected on this ground as opposed to 13.8% among white applicants. Dr. Siskin found this difference to be statistically significant at below the .01 level. With the advent of the BES test in 1968 and for the period 1968-70, it is more than coincidental that minorities were rejected in disproportionate numbers on grounds of failure to pass the test but very few applicants were rejected for having applied in error. The disproportionate impact of the BES test was acknowledged by Mr. Dawson. From 1968-1970, minority individuals

failed the BES test at a 23.24% rate, whereas whites failed at a 9.08% rate. That test has not, as discussed below, been shown to have been validated.

But the BES testing procedure is only part of the discrimination practiced against minorities by the JATC. As further illustration in 1969, in district I there were 95 minority and 142 white applicants. After qualificational procedures, the resulting pool was 47% minority (41 of 88). Among actual selectees, however, minorities constituted 4 of 23. Part of the reason for this result was that the existing waiting list in 1968 was predominantly white.[37]

It is not merely in gaining access to the JATC's RA program that a racial disparity appears. Even among the successfully tested and interviewed entrants into the RA program for the years 1973-1974, whites in each respective class worked more hours on the average (168 hours more in 1974 by 1973 white entries; 392 hours more in 1974 by 1974 white entries) and earned more wages on the average ($1,024 more in 1974 by 1973 white entries; $2,331 more in 1974 by 1974 white entries) than minority class members. In 1972, the 1972 white entrants on the average worked 378 hours more than minorities and earned $2,223 more. Dr. Siskin found the *pattern* of diminished rewards for minorities from these classes to be statistically significant at below the .05 level.

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[37] At least one of the minority individuals, Lucius Randolph, was originally listed at having passed the BES test but was later told that he failed. This resulted when the JATC had the BES test scores checked for those who scored low on the JATC test. Plaintiffs contend that when the JATC realized the high number of minorities which had passed the BES test it "upped" the passing grade, as it were, guided by the belief that commensurate with past experience proportionately more minorities than whites would be excluded. Approximately twenty persons were deemed unqualified as a result of these changes, but there is no admissible evidence on how many were minorities.

For specific instances of the treatment of minority individuals by the JATC, see the narration of testimony *supra*.

This difference in total hours and wages, in context, is corroborative of discrimination even if it is not decisive viewed alone. Furthermore, a larger percentage of minorities than whites have been suspended: 22% versus 6.4% between 1972-1974.[38]

There has been no evidence of the validity of the JATC tests or the personal interviews. No study of the age and educational requirement has been made by defendants. The educational requirement was historically novel to 542; officials Emrick, Walsh, and Ciavaglia themselves never graduated from high school. No other method of entry requires a high school degree. No creditable evidence has been presented which would show that the educational, age, and interview requirements are a valid basis for making judgments on the fitness of applicants to become operating engineers. Persuasive evidence has been presented indicating the contrary.[39] Concerning the validity of the RA testing, we must distinguish the early tests and the JATC test from the BES test. It is only for the BES test that a validation analysis was ever attempted. I find that none of the tests was validly job-related.

Plaintiffs' expert on this subject was Dr. Richard Barrett, an industrial psychologist with an impressive list of publications and Professor of Management Science at Stephens Institute of Technology. He concluded that the

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[38] A study of the 1969 RA class showed that minority RAs worked more hours in 1972 than did white RAs on the average. There were only 3 minorities among a total of 49 workers in this study and 1972 was the only year for which this was true. Other analyses by Sisken of individual classes (1970-1972) reveal, consistently, fewer hours worked by RAs.

[39] As some of the evidence that educational requirements were inappropriate there is the fact that in the 1966 class of A branch entrants (prior to the educational qualifications), 85.1% of those having less than a full high school education successfully completed the RA program as opposed to 86.5% of those with full high school educations.

high school educational requirement was not related to job performance. He concluded likewise for the JATC test, since it was not validated, and the personal interview procedure. He concluded that the BES test, which had and was known to have had disparate and discriminatory impact, was not validated by the proffered reports of the United States Training and Employment Service. Barrett determined that those reports were based on a sample which was unrepresentative: the average age was forty and experience ranged from 13 months on a given job, for part of this sample, to 178 months total. This is far beyond the limits of experience among RA applicants. Barrett concluded, for these reasons and because of insufficient correlations between test scores and job performance, that the above-referred-to reports did not serve to validate the use of the BES test in this case. I credit his conclusions and find them persuasive. I find further that the reports are not persuasive evidence of validation and hence are insufficient to justify valid use of the BES test.[40]

In summary, I find the BES test to have contributed to a disparate discriminatory impact in entry to the RA program without a valid job-related purpose. I further find that the statistically significant disparity between minority entries and white entries into the RA program between 1966 and 1972 and the continuing significant disparities between the minority labor pool and the minority RA graduates were the result of overall, non-validated requirements, manipulation of those requirements, and of intentional discrimination participating in the overall pattern of union discrimination previously discussed and proven by statistical and non-statistical evidence.

K. *Glasgow, Inc. and the Associations*

The ground for liability of defendant class representative Glasgow, Inc. is, in the context of this defendant

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[40] Among the 289 minorities who took that test, 20.4% failed it. Among the 1937 whites who took the test, 10% failed.

class suit, principally based upon the legal theory that Glasgow, like other contractors relying on the union's hiring hall, is liable at least injunctively under 42 U.S.C. 1981 for the discriminatory acts of the union. This theory also embraces the defendant associations who participated in the creation or approval of an exclusive hiring hall provision. In this sense, the only necessary proof agaisnt Glasgow in particular is that it relied contractually upon the hiring hall and is in that respect like other defendant class member contractors working in the 542 jurisdiction. The prerequisite participation of the four named defendant associations has also been proved. This proof, indeed, is not seriously contested.

Plaintiffs have also alleged intentional discrimination broadly throughout the defendant class of contractors and they have similarly alleged a conspiracy among contractors and the union. As discussed below, the intentional discrimination claim and the conspiracy claim are inapplicable in this defendant class context because of the individual questions presented. Plaintiffs have, however, offered much proof pertaining to Glasgow individually and I will discuss this briefly. The conduct of the associations particularly with respect to the "Affirmative Action Program" which substituted for the Philadelphia Plan demonstrated a reckless disregard for equal employment opportunity for minorities but will not be recounted here.

Dr. Siskin studied data pertaining to Glasgow's employment of operating engineers for the years 1969-1971. He concluded, based upon statistical analyses, that minorities were disproportionately given short-term employment. Although the minority labor pool for Local 542 as a whole is 11.5%, and although much of Glasgow's work was, as of 1971, centered in District I where the minority labor pool is much higher, between 1969 and 1971 minority individuals averaged only 1.3% of the total hours of employment by operating engineers at Glasgow. For the period 1968-1970, the relative brevity of jobs for

minority operating engineer workers is significant below the 1 in ten billion level.

The percentage of minority hirees during any one year from 1969-71, and the corresponding average hours, appears in the following year-by-year table:

	Hiring Rate Per Year	Hours percentage
1968	2.34%	1.20%
1969	3.16%	2.80%
1970	3.36%	0.65%
1971	9.2%	5.44%

To expand upon some of Siskin's calculations, during the period 1968-1970, whites who were hired in each year worked, on the average, twice as long as minorities hired during the same year. In 1971 minority hirees average 190.8 hours while white hirees averaged 334.6 hours.

The number of hirees referred through the hiring hall is not the complete number of Glasgow employees. Some employees serve on a continuing basis year to year. Thus the 1.3% overall rate of minority hours reflects a disproportionately low average number of hours among continuing employees for these years. In 1971 when 9.2% of those hired were minority, only .42% of the hours among continuing employees were minority hours; 80.4% of all the hours worked were worked by continuing, and almost exclusively white, employees. Between 1968 and 1971, Siskin calculated, 117 whites worked continuously more than two years, 22 whites worked more than three years, and only 1 minority worked more than two years. The place of employment of Glasgows' operating engineer employees is centered in the District I area rather than in one of the more predominantly white districts. In 1971, 70.2% of these employees were assigned there.

Between 1972-1975,[41] minorities constituted 4.3% of all those employed, 2.1% of the hours worked and 2.2% of the wages earned. During this period, the percentage

[41] Only part of 1975 was studied.

of the minority employees reached its highest in 1972 at 4.7%; however, the percentage of hours worked and wages earned by minorities in that year were only 1.2%, the lowest for the four-year period. The average wage among those minorities who were employed was $9.28 per hour as opposed to $8.73 per hour earned by white operators. This slight increase to those employed minorities is insignificant in comparison to the disparities.

Defendants further calculated for the years 1972-1975 reasons for termination among white and minority operating engineers. During the total period, the principal reason for termination was lay off due, basically, to lack of work, weather, or temporary replacements. Whites were terminated by lay-offs at a rate of about 83%, minorities were terminated at a rate of about 80%. Among those discharged for cause 30 were white (1.6%) and only 2 were minority (3.08%).

Apart from the above statistical data, plaintiffs assert instances which they claim reveal discrimination. Plaintiffs also point out that, although Glasgow makes its own selections for master mechanics, none was a minority operating engineer, and hiring by master mechanics were, in the cases of James Swiggard (son of the union's auditor) and Frank Malloy, discriminatory and impermissibly outside the hiring hall system. Further plaintiffs cite three cases in which minorities were laid off from jobs only to be replaced at those jobs by whites. In another case, that of Willis Fox (see *supra*), an unidentified master mechanic's promise of placement on better paying machinery when it became available was disregarded in favor of a white operator. I find that these instances do constitute some proof of discrimination.

It must be pointed out that the studies performed by Siskin were not regression analyses but raw calculations of disparities. This is in contrast to Siskin's analysis of hours and wages of union members overall. Further, the statistics for 1968-1970 were based on 87.6% of those hired during that period, reflecting the available informa-

tion.[42] It is my conclusion that this "sample" is not unrepresentative. The 1971 data are based on complete employee information.

Dr. Perl, the expert for the contractors, associations and Glasgow, specifically contradicted the finding of Siskin that the disparities in average wages from 1968-1970 among minority operating engineers were significant at below the 1 in ten billion level. Perl stated the significance was below the .01 level instead. Perl attributed the differences to his rejection of Siskin's stated standard errors. Perl also undertook a regression analysis for the 1971 data adding a number of factors, particularly skills on specific kinds of machinery. His result was a 126 hour disparity by race which because of the performance of the regression eluded a determination of significance. Plaintiffs' complain that Perl considered only 156 of the 218 hirees during 1971. Moreover, Perl's single study of the 1971 data in itself did nothing to rebut Siskin's analysis for other years.

Although I find in favor of all of Siskin's above conclusions about Glasgow, the fact remains that he did not attempt a regression analysis which would equalize the factors of age, list, seniority, branch and district. There is thus a possibility that these differentiating factors could account for part of the statistical race effect. Despite the lack of a regression analysis, however, the racially related discrepancies in Glasgow's workforce and its payroll are patent. They have not been and cannot be satisfactorily explained either with reference to the minority labor pool, the minority representation in Local 542, or any analysis or evidence offered by defendants. The existence of a substantial and almost exclusively

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[42] The data for these years excludes those who were referred to jobs in which less than three operating engineers were engaged. Siskin assumes the sample does not affect randomness and hence assumes that minorities were not assigned disproportionately to such small jobs, or for disproportionate lengths of time. With this qualification has analysis bears a .05 level of significance.

white continuing workforce during the years examined is certainly not an excuse for the disparities which such an arrangement fostered in the absence of any persuasive or substantial showing that these workers have characteristics which were job-related and that they are in those respects unlike the available minority labor pool. The suggestion that these men were maintained because they were willing to travel is simply unsupportable.

While substantial evidence has been presented which plaintiffs assert demonstrates intentional discrimination or discrimination in impact by Glasgow, most of this evidence would be more appropriate in the damages stage of this litigation at which time Glasgow's practices could be evaluated together with the practices of other employers. Thus, I refuse to treat Glasgow separately from the other parties to the contract. Likewise I will not treat the associations separately.

III. *Legal Conclusions*

Remaining for consideration are the conclusions underlying my decision that the union and the defendant class of contractors and associations are liable at least injunctively for the discrimination practiced through Local 542. Discussed below are the issues pertaining to the certification of plaintiffs' class, the requirements of Title VII, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981, and finally the matter of the appropriateness of the defendant class.[43]

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[43] Because of my decision on Title VII liability and liability under § 1981 and solely because those provisions permit complete and comprehensive relief, although as yet remaining to be determined, I do not here decide: (1) the issue of legal liability of the union under the National Labor Relations Act. 29 U.S.C. § 141 *et seq.* (1970) for breach of its duty of fair representation; or (2) the claim of a private action for discrimination in programs receiving federal funding under Title VI, 42 U.S.C. § 2000d *et seq.* (1970).

A. *Appropriateness of Plaintiffs' Class: Considerations of Standing and the Requirements of Rule 23*

The first legal issue which I must consider is whether the named plaintiffs have met the class requirements of rule 23, *F.R.Civ.P.*, and the constitutional Article III requirement of standing. Rule 23(a) defines the standards by which representative parties must be measured.[44] To some extent these requirements overlap the requirement under Article III that the named plaintiffs be members of the class they seek to represent. At times the courts have appeared to treat adequacy, commonality, typicality and standing almost interchangeably, sometimes treating adequacy as inclusive of commonality and typicality. Defendants' objections to the plaintiffs' class and its proposed redefinition touch upon all of these issues. The following discussion will focus first on the issues of adequacy and standing.

1. *Adequacy and Standing*

Defendants point out that the named plaintiffs were all graduates of the Benjamin Franklin programs and that at the time of certification seven were on the Group III, low priority, out-of-work list while only one had attained union membership and Group I status. The argument is that Group III named plaintiffs' interests are different from those of members in Group II and Group I. We must look first to *East Texas Motor Freight System v. Rodriguez*, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), in order to test the certification of plaintiffs' class.

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[44] Rule 23(a) provides as follows:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In *East Texas* the Supreme Court reaffirmed the view that a named plaintiff cannot, consistent with the standing requirements of Article III and the adequacy requirements of rule 23(a)(4), represent a class of persons if he does not at the time of certification "possess the same interest and suffer the same injury" which he is seeking to prove on behalf of the other class members.[45] *Id.* 97 S.Ct. at 1896; *accord, Sosna v. Iowa*, 419 U.S. 393, 403, 95 St.Ct. 553, 42 L.Ed.2d 532 (1975). The representative plaintiffs in *East Texas* were intra-city truck drivers who, because of poor job performance records, simply did not possess the qualifications to become "line drivers." Plaintiffs in that case alleged discrimination in being barred from transferring to the line driver positions by a no-transfer rule and thus being locked in to jobs which were discriminatorily assigned. The court observed:

> [Plaintiffs] could have suffered no injury as a result of the alleged discriminatory practices, and they were, therefore, simply not eligible to represent a class of persons who did allegedly suffer injury. *Furthermore*, each named plaintiff *stipulated* that he had not been discriminated against with respect to his initial hire. In the light of that stipulation they were hardly in a position to mount a classwide attack on the no-transfer rule and seniority system on the ground that these practices perpetuated past discrimination and locked minorities into the less desirable jobs to which they had been discriminatorily assigned. [*Id.* 97 S.Ct. at 1897 (emphasis added)]

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[45] It is apparent also that, although the Court focused on the class membership issue in its discussion, citing cases delineating the Article III standing doctrine, it also considered named plaintiffs' stipulation and the proof of their lack of qualifications in concluding that rule 23(a) was not satisfied. *See id.* 419 U.S. at 401-02, 95 S.Ct. 553. The Court also added that the plaintiffs' failure to move for class certification prior to trial and the existence of a conflict between the plaintiff's complaint and a union vote of class members created indicia of inadequacy.

East Texas is particularly important to this case because of the qualificational differences among the named plaintiffs here. A member of 542 may not have suffered precisely the same alleged injury of entry discrimination or discriminatory referrals which Group III registrants may have suffered.

But *East Texas* is distinguishable from the instant case. The representatives in this case are alleging general discrimination in employment practices, principally in membership, application, entry, hours and wages, and referral. Equally important, no class representative has here stipulated that there was no discrimination in obtaining his initial status with the union and its hiring hall, and none of the instant representatives suffers from the patently poor job performance record which would on its face preclude advancement to union membership and regular job referral. Potentially, therefore, every class representative and every class member, regardless of his Group position or the status of his union affiliation, has suffered from the alleged single pattern and practice of discrimination and can benefit, together with all others, from the systematic removal of and compensation for discrimination. Thus, the prerequisites for standing are satisfied: the named plaintiffs are members of the class they seek to represent and have alleged the same basic personal injury as that which they allege was suffered by the class. We are also counselled in this conclusion by *Hackett v. McGuire Bros.*, 445 F.2d 442, 446-47 (3d Cir. 1971), which requires in the interest of public policy that standing be interpreted as liberally as Article III permits in Title VII and § 1981 actions.

In addition to the considerations raised by *East Texas*, in determining whether the named plaintiffs are adequate representatives under rule 23(a)(4), we must also consider the two criteria set forth in *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3d Cir. 1975):

> (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed

litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.

By the record in this case on the liability phase it is clear that the plaintiffs' counsel are qualified, experienced and clearly able to conduct this aspect of the litigation. But this finding should not influence a subsequent trial judge in deciding whether at the damage phase plaintiffs' counsel can represent all litigants.

The argument that the named plaintiffs are in antagonistic positions is grounded essentially on the view that listees in Group I would profit by minimizing competition from Group III and perhaps Group II. According to this view the advancement of some class members from low priority positions will dilute the interests of those minority persons who are in a priority position. This competition (hence inadequacy) theory, apart from painting a rather grim picture of human nature, is of its own nature highly speculative and could, if adopted generally, defeat much of the effectiveness of the class action device. Nearly everly class representative in any context involving disputed facts could in the same speculative way possess the potential to place his own cause above that of the class. In any event, in the present circumstances at the liability stage of the trial the competition theory misperceives the real thrust of rule 23(a) which requires more realistically that there be no "antagonism [*arising*] . . . as to *the subject matter of the suit.*" *Redmond v. Commerce Trust Co.*, 144 F.2d 140, 151 (8th Cir.), *cert. denied*, 323 U.S. 776, 65 S.Ct. 187, 89 L.Ed. 620 (1944) (emphasis added); *accord*, *Gates v. Dalton*, 67 F.R.D. 621, 630 (E.D.N.Y. 1975); *see* 3B J. Moore, *Federal Practice* ¶ 23.07(3) (1976). As to the issues raised in the complaint and the legal positions which have been or could be taken by any representative at the liability stage there is no conflict. No plaintiff is attacking the concept of a multi-tier experience-graded referral system; rather, plaintiffs attack the failure of the union hiring hall to provide for minorities equal access to and

use of that system. Such a claim is consistent with all the representatives' claims and adverse to none.

Questions of commonality and typicality, which overlap somewhat the question of adequacy, have also been asserted. The argument that commonality has not been shown is based upon the view that, quite apart from the question of conflicts among class representatives, the claims of Group I, II and III named plaintiffs are essentially different from each other and hence not subject to class action treatment together. This analysis is unacceptable. The issue whether the defendants have undertaken a pattern and practice of discrimination is itself essentially a single issue. The practices alleged against the defendants may have varied somewhat and hence may require separate avenues of proof, some of which will be beyond the familiarity of some of the named plaintiffs, but none of which will be beyond the familiarity of all. The presence of representatives from the various work lists (some possessing attributes of union membership and non-membership, high priority or low priority listing) does not render inconsistent each representative's claims, but rather assures the kind of diversity necessary to the presentation of all possible avenues of the pattern of alleged employment discrimination. It is in this sense that the plaintiffs' class is a single class, able to be represented as a whole by the same counsel. The standard in rule 23(a)(2) is therefore duly met.

In much the same sense, the prerequisites of rule 23(a)(3), that the "claims or defenses of the representative parties are typical of the claims or defenses of the class," are easily satisfied here. The typically requirement has been interpreted to mean that the "interest of the representative party be coextensive with the interest of the entire class . . . ." *Eisen v. Carlisle and Jacquelin*, 391 F.2d 555, 562-63 (2d Cir. 1968). Because upon examining the requirement of adequacy and commonality it has appeared clearly that the representatives

in this case reflect an interest coextensive with all other representatives and with all members of the entire class and occupy diverse positions in the hiring hall system, there is no reasonable likelihood that legal claims of members of the class or elements of proof at trial would have been overlooked.

2. *Rule 23(b)*

As the second basic prerequisite to class action certification, some provision of rule 23(b) must also be fulfilled. Inasmuch as the present case involves a plea (central to plaintiffs' case) for injunctive relief to correct the causes of discrimination in union entry and in the hiring hall process and the discriminatory lack of minority participation, the terms of 23(b)(2) are most clearly applicable:

> (b) an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * * * *
>
> (2) *The party opposing the class has acted or refused to act on grounds generally applicable to the class* thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . [Emphasis added]

Plaintiffs' allegation and proof that defendants have engaged in a pattern and practice of racial discrimination necessitates the conclusion that those defendants have allegedly discriminated against the *class of* minority individuals. The Notes of the Advisory Committee plainly indicate, by way of illustration, that a class-based discrimination claim will typically fall under rule 23(b)(2) so long as damages relief is not the exclusive or predominant relief sought. *See* 3B J. Moore, *Federal Practice* ¶ 23.40 at 23-651 (1976). Moreover, the Third Circuit, in *Wetzel*, 508 F.2d 239, has held that a claim for back pay, as is raised in this case, does not make (b)(2) certification inappropriate where injunctive relief from employment discrimination is also requested.

In addition to certification under (b)(2), certification is appropriate under (b)(1)(A), permitting a certified class where prosecution of separate actions would risk.

> inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class
>
> * * * * *

If individual members of the plaintiff class were left to prove their case against defendants there would not only be gross inefficiency arising from the multiple actions and duplication of proof, but there would be a risk that some, *but not all*, suing members of the class alleging personal discrimination through systemwide discriminatory policies or practices would be granted injunctive relief. This, in turn, could produce the possibility that the defendants as a class would be obliged to provide make-whole relief (perhaps assuring some measure of hours and wages) and correct errant systemwide policies and practices (as by modifications in referral procedure) as to some minority operating engineers while at the same time bearing either no obligation at all or possibly different obligations to other minority operating engineers. This is not a feasible result in the reality of a uniform hiring hall system, the concept of which has not been assailed.

Having given specific attention to the requirements of rule 23, it seems useful now to provide an overview for purposes of perspective. The case of *Gibson v. Local 40, Supercargoes and Checkers of the International Longshoremens' and Warehousemens' Union*, 543 F.2d 1259 (9th Cir. 1976), although specifically considering only the 23(a)(3) (typicality) and 23(b)(2) standards, serves as a helpful foil to the range of issues considered in the certification decision in this case. *Gibson* invoked a claim by four clerical workers against an employer association and the union which operated an exclusive hiring hall. The plaintiffs charged discrimination against

blacks in the selection of persons to perform clerical duties during the unloading of ships. Clerks were classed into A, B, and casual clerk divisions. Class A, the only class of union members, received priority referrals; then followed the B clerks; and then casual clerks. Plaintiffs were in the lowest category. Although plaintiffs sought to represent all three levels, the Court of Appeals limited the scope of the class to those "black persons who are or may be employed, or who may have attempted or may attempt to obtain employment, as *casual clerks* . . . ." *Id.* at 1264 (emphasis added).

In reaching its conclusion the court was fully aware that

> [a] class action may be maintained . . . alleging a general course of racial discrimination by an employer or union, though the discrimination may have been manifested in a variety of practices affecting different members of the class in different ways and at different times. [*Id.*]

Nevertheless, the court narrowed the class to black casual clerks for the following reasons:

> All of the appellants [plaintiffs] were casuals. All held other employment. None of them sought employment as class A or class B clerks or indicated any interest in doing so. The pretrial and trial record concentrated upon the referral and employment of casuals. It is noticeably less complete with respect to the referral and employment of class A and class B clerks. [*Id.* at 1265]

Most important for the purposes of our present analysis is the conspicuous absence in this case of the factors which weighed against certification of a class of employees from all levels of the hiring hall in *Gibson*. First, at the time of certification here at least one of the named plaintiffs was a member of 542, a listee in Group I, II or III, or an applicant to the RA program. Second, the Group III and Group II named plaintiffs seek permanent and regular employment as operating engineers and *a*

fortiori seek to advance to a priority status on the out-of-work lists and hence into Group I. All of the named plaintiffs who are not now members of Local 542 desire such membership. The record pre-trial and at trial was fully developed to address the variety of practices which the plaintiffs alleged to constitute a pattern and practice of discrimination. The decisive contrast with *Gibson* thus reinforces the certification in this case.

3. *Subclassing*

Remaining for consideration is the purpose and effect of the certification of plaintiffs' class by subclass upon a motion pursuant to rule 23(c)(4)(B). That rule provides: "a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." It is apparent that the purpose of this section was to permit the use of a class action device even where two or more adverse or potentially adverse classes of plaintiffs were involved. Once such antagonism is noted each class must separately satisfy sections (a) and (b) of rule 23. There is litle doubt that this includes the requirements for adequacy purposes, as stated by *Wetzel*, 508 F.2d 239, that each class be represented by qualified counsel and also that representatives be aligned to the appropriate subclass category. *See Wolfson v. Solomon*, 54 F.R.D. 584 (S.D.N.Y. 1972).

Although in the present case plaintiffs' original motion for subclassification was granted for skilled minority operating engineers, partially skilled minority operating engineers and as yet unskilled minority persons who wish or may wish to acquire skills in the operating engineer trade, the division was never intended to accommodate antagonism between class representatives or class members. Indeed, paragraph seven of the plaintiff's motion to certify subclasses stated that there was no antagonism among the class members. While the division into subclass groups performed the minimally

beneficial function of logically describing the different work qualification levels among representatives and class members generally, for all practical purposes the action proceeded just as if no subclasses had been defined. There is thus no conflict with rule 23(c)(4)(B)'s implicit requirement, through 23(a)(4), that each subclass be represented by separate counsel. Because of the absence of antagonism and the existence of a common certifiable class those class representatives and class members who fall into one of the three above-described experience levels were adequately represented by the same counsel.

4. *Motion for Amendment of Plaintiffs' Class Definition*

Having concluded that the original certification of a plaintiff class was appropriate we may now consider the question whether under rule 23(c)(1) plaintiffs' motion to redefine the plaintiffs' class can or should be allowed. The standard which must be applied, as articulated in *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24 (1977), is "whether the changed class is within the issues tried by express or implied consent by the parties." *Id.* at 37; *see EEOC v. Detroit Edison*, 515 F.2d 301, 310 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951, 97 S.Ct. 2668, 2669, 53 L.Ed.2d 267 (1977). In order to determine whether the proposed definition is permissible the purposes and scope of the changes must be carefully considered. The proposed redefinition is as follows:

> (a) For all claims arising under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, the plaintiff class shall include all minority persons (i.e., blacks, Spanish-Surnameds, Orientals and American Indians) who:
>
> > (1) Were members, registrants, apprentices or otherwise affiliated with defendant Local 542 at any time between April 30, 1968, and the date of this decree;

(2) Applied for membership or affiliation with defendant Local 542, or who would have applied for membership or affiliation with Local 542 but were deferred from doing so because of Local 542's discriminatory practices, at any time between April 30, 1968, and the date of this decree; and

(3) Apply for membership or affiliation with defendant Local 542 from the date of this decree until this Court dismisses jurisdiction over this action.

(b) For all claims arising under the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§ 1981 and 1985(3), and under 29 U.S.C. § 158, the plaintiff class shall include all minority persons who:

(1) Were members, registrants, apprentices or otherwise affiliated with defendant Local 542 at any time between November 8, 1965, and the date of this decree;

(2) Applied for membership or affiliation with defendant Local 542, or who would have applied for membership or affiliation with Local 542 but were deterred from doing so because of Local 542's discriminatory practices, at any time between November 8, 1965, and the date of this decree; and

(3) Apply for membership or affiliation with defendant Local 542 from the date of this decree until this Court dismisses jurisdiction over this action.

Because the proposed amendment arises after trial of this action, there must be a firm reluctance on the part of this court to accept any part of the recertification proposal which might unfairly expand the scope of the class. Comparing the provisions recited above to the original class certification order, set forth in Part I, it is

plain that for the most part there is no substantive change. The class as originally certified was divided into the following subclasses: those minority persons in 542's jurisdiction possessing at least the skills of journeymen operating engineers, those possessing partial skills, and those who wish or in the future may wish to acquire such skills. Thus, members, registrants, and apprentices were included in the overall class. Unsuccessful applicants for membership or affiliation logically fall into at least one of the three original subclasses, and discouraged non-applicants, though not specifically mentioned, fall into the last of the original subclass descriptions.

Defining the scope of the class to reflect the statute of limitations applicable to particular statutory claims, each of which was denoted in the complaint itself, does not on its face produce a substantive expansion of legal claims, for the statutory foundations of the suit implicitly limit the relief available to the class however it is defined. *See Wetzel*, 508 F.2d 239, 246.[46]

The argument has been raised, however, that expanding the purview of the class action to encompass pre-1969, pre-Benjamin Franklin I, claims exceeds the standing of named plaintiffs, none of whom asserts any personal injury before that time. Notably *Wetzel*, in holding

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[46] I adopt the six-year period for the § 1981 claim for reasons expressed in my opinion in *Collier v. Philadelphia Gas Works*, 441 F.Supp. 1208 (E.D.Pa. 1977). *See Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978) (applying six-year statute of limitations by analogy to 12 P.S. § 31 in a case of discriminatory discharge).

The period by which the class of those having a Title VII claim is defined began as of March 19, 1969, 90 days prior to the time of the filing of an EEOC charge by named plaintiffs Williams and McKay. The recertification incorporates this limitation. I reject use of the Ximines charge for this purpose in the absence of specific authority on point and because as a practical matter the availability of relief under § 1981 encompasses the relief available under Title VII. This issue might become important if § 1981 liability is struck out of the case on an appeal.

that it was proper to define the class with reference to the administrative filing period, did not consider this point. In that case, two female employees alleged Title VII sex discrimination. The court held that persons who were not in a position to make a charge of sex discrimination with the EEOC within 180 days prior to the charge made by named plaintiffs could not be included in the class. But it does not appear from *Wetzel* that the named plaintiffs had been employed less than 180 days before their filing an EEOC charge. Had they been employed only 90 days, for instance, the court would have had to face the issue presented here—whether unnamed potential claimants who suffered injury prior to the occurrence of any injury to named plaintiffs, but within the limitation period, could be included in a recovering class.

The emphasis in *East Texas Motor*, *supra*, on the precise likeness of named plaintiffs claims to those of the plaintiff class members might appear to make the decision of this issue somewhat troublesome. It is clear, however, that pre-1969 issues have been fully illuminated by plaintiffs during the course of this suit. Those issues were directly relevant to the claims of named plaintiffs. To eliminate from the class all members who have suffered an injury from a common source in a common system as proven by common evidence, but who have not suffered that injury at the same time, would require an overly technical view of standing. This aspect of the present case is unlike *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), where plaintiffs who had not taken a suspect 1969 employment screening test were barred on standing grounds from representing those who did, even though named plaintiffs had taken a subsequent test. In that case, there would have been little reason for named plaintiffs to pursue proof of discrimination in a 1969 test. Proof of the disparate impact produced by the 1969 test would be irrelevant to the impact of subsequent tests. Here, however, named plain-

tiffs have alleged "pattern and practice" in addition to a "disparate impact" theory of discrimination as a result of union activities which predated the specific occurrence of their individual claims.

The only other matter for discussion in the redefinition proposal is the specific inclusion of the group of deterred non-applicants. In *EEOC v. Detroit Edison* the Sixth Circuit Court of Appeals rejected a post-trial attempt to include deterred non-applicants where the district court's original certification merely created a class of "all black Edison Employees." *Id.* at 310. The Court of Appeals condemned this as inconsistent with "fairness . . . [and] the provisions of Rule 23(c)(1)." The court went on to explain by way of dictum that the inclusion of deterred non-applicants would at least require strict subclass separation in order to avoid possibly antagonistic interests between such a group and actual employees. The court's primary concern was with the adequacy of representation, given the *res judicata* impact of a class action decision.

Despite the concerns expressed in *Detroit Edison*, inclusion of the class of deterred non-applicants seems appropriate in this case where one of the original subclass designations included them.

It is certainly clear that persons deterred from applying for employment because of an employer's reputation for discriminatory activity, where that reputation for discriminatory activity, where that reputation derives from actual discrimination, can state a cause of action and obtain relief. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).[47] At issue in the present situation

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[47] *Teamsters* involved the issue whether city drivers who were discouraged from transfer to "line driver" status could obtain relief without having actually made an application. The Court stated rather broadly:

[Footnote continued on page 125]

is whether the named plaintiffs, none of whom was a deterred non-applicant, are able adequately to represent such a group. Because the named plaintiffs have been found adequate to the task of proving a pattern and practice of employment discrimination, they are, I believe, at the same time adequate to prove the existence of all those conditions of discrimination which would deter applications from minority persons. The named plaintiffs in proving a pattern and practice of discrimination were proving all that is necessary to be proved at this stage with respect to non-applicants. This result is not unlike that reached in *Wetzel*, 508 F.2d 239, where the court determined that a former employee was an adequate representative of a class that included present employees.

On the question whether an individual has actually been deterred, and thus whether he may receive compensation, the Court in *Teamsters* has indicated that such an individual will himself bear the burden of producing evidence that he is qualified and that he would have applied to an employer but for its reputation for discrimination. Those issues, claims or defenses particular to a deterred non-applicant are not in any event to be considered at this liability stage.

Thus, where the range of issues necessary or appropriate to the establishment of defendants' liability to deterred non-applicants would be fully and adequately treated by a class of applicants and employees in the nat-

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[47] [Continued]

The denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of minority groups.

431 U.S. at 367, 97 S.Ct. at 1870.

ural course of the presentation of issues necessary to their own claims and where the class of non-applicants was implicitly within the scope of the original certified class, the inclusion specifically of deterred non-applicants is appropriate. There is no unfairness in extending *res judicata* effects to the non-applicant group. Doing so does not, moreover, in any way affect the scope of defendants' proof.

B. *Substantive Claims*

1. *Claims Against the Union*

a. *Title VII*

At the core of this class action is plaintiffs' Title VII, 42 U.S.C. § 2000e, et seq. (1970), claim against Local 542 for employment discrimination against minority individuals.[48] Under the provisions of Title VII a jurisdictional prerequisite to bringing an employment discrimi-

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[48] Sections 2000e-2(c) and (d) provide:

Labor Organization Practice

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual

nation action in district court is the filing of a charge with the Equal Employment Opportunity Commission, who will then have an opportunity to investigate the charge and take steps to resolve the dispute out of court. As was noted earlier, three black Benjamin Franklin I graduates (Williams, McKay and Muchison), having returned from Resica Falls to be listed in the lowest priority group without experience credit for their six-month training, and having gone two weeks without referrals, filed pro se on June 17, 1969, a charge with the EEOC against Local 542. In this charge they alleged the fundamental facts of their training and complained that they received no referrals due to discrimination based on race. Prior to this charge, in 1968, EEOC Commissioner Vincent Ximines had filed a charge against 542 alleging discrimination against blacks in referrals, the referral system, limitations on and classifications of membership, and entry to the apprenticeship program. The following represents my conclusions with respect to, first, the jurisdictional issues raised by plaintiffs' Title VII claim, and, second, the merits of that claim.

i. Title VII Jurisdictional Issues

Defendant Local 542, relying upon 42 U.S.C. § 2000e-5(b), argues that in the present case there was no satisfactory attempt at conciliation by the EEOC and that therefore the present action by private individuals is jurisdictionally barred under Title VII. At the time relevant to this case an EEOC charge was required to be filed within ninety (90) days of the alleged discriminatory occurrence. It is not disputed that this jurisdictional requirement was satisfied by the three pro se claimants and Commissioner Ximines. Alternatively defendant asserts that the scope of plaintiffs' suit must be limited by the allegations of the pro se charge, rather than by

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because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Ximines' charge or by any combination of the two. The conciliation issue will be addressed first.

(a) *Conciliation*

Under § 2000e-5(b) the EEOC is given a duty to conciliate if it determines that the charge has merit:

> If the Commission determines . . . that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

The Act also provides, pursuant to a 1972 amendment not operative at the time the plaintiffs' action was filed, that if conciliation has not been reached in 180 days the Commission may itself bring suit. Prior to the 1972 changes in Title VII the Commission had no power to sue.

There have been cases since the amendment in which the absence of a conciliation effort was viewed as a jurisdictional bar. *E.g.*, *EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944, 947-948 (8th Cir. 1974); *EEOC v. E. I. DuPont de Nemours & Co.*, 373 F.Supp. 1321, 1333-34 (D.Del. 1974). However, these are cases in which the EEOC was itself the plaintiff. *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976), *cert. denied*, 429 U.S. 920, 97 S.Ct. 314, 50 L.Ed.2d 286 (1976), addresses the issue most concisely:

> The 1972 amendments to Title VII empowered the commission to sue if it is unable to secure an acceptable conciliation agreement. This provision of the Act has been construed to create an express condition on the commission's power to sue.

Id. at 272. The court distinguished EEOC suits from suits by individual employees on their own behalf:

> We have held that the commission's failure to attempt conciliation is not a jurisdictional bar to an employee's action, because the employee cannot be charged with the commission's failure to execute its statutory duties.

Id. at 272, n. 14. *Accord, Johnson v. Nekooska-Edwards Paper Co.*, 558 F.2d 841 (8th Cir. 1977); *cf. Fekete v. United States Steel Corp.*, 424 F.2d 331, 335 (3d Cir. 1970). The solution offered by *Patterson* seems to be the only sensible one. Placing upon individual plaintiffs the burden of pressuring the EEOC to perform its obligations would turn a provision designed to achieve early out-of-court settlement of disputes into a provision perpetuating delay and procedural entanglements to the particular disadvantage of those claiming discrimination. *See Occidental Life Insurance Co. of California v. EEOC*, 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977). There is, therefore, no jurisdictional impediment to suit even if the EEOC failed to attempt conciliation.

(b) *Scope of Suit*

The closer question is whether the 1969 pro se charge or the 1968 Commissioner's charge or both should serve as the foundation defining the permissible scope of plaintiffs' § 2000e-2 case. This question is significant because the scope of the charge made to the EEOC may serve to limit the scope of any subsequent suit. *See Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 162 (5th Cir. 1971).

It might be a simple matter to disregard Commissioner Ximines' charge were it not for the deliberate connection drawn by the EEOC between that and the pro se charge. In its decision letter on the pro se charge the Commission specifically stated that the pro se claimants were as a matter of procedural right (29 C.F.R. § 1601.25b (June 18, 1970)) entitled to receive the Ximines decision. The Commission stated that the pro se claimants should receive that decision because they were aggrieved personally by the discrimination alleged by Ximines and because they were members of the aggrieved class. The fact that James Nunes investigated both cases for the EEOC strengthens the connection. The pro se litigants may thus have been entitled to receive right to sue letters

stemming from Ximines' charge in these circumstances. There is therefore a substantial argument that Ximines' undeniably comprehensive charge should serve to define the breadth of plaintiffs' suit. But this conclusion is not essential to the decision here.

The only reasonable basis for limiting the scope of a Title VII suit by the charges before the EEOC is to accommodate the conciliation capabilities of the EEOC and to prevent the circumvention of the administrative filing requirement. In *McBride v. Delta Air Lines, Inc.*, 551 F.2d 113 (6th Cir. 1977), the court held that "[b]ecause administrative complaints are filed by completing a form designed to elicit specificity in charges, and because the forms are not legal pleadings and are rarely filed with the advice of legal counsel" the subject matter of a district court suit should be limited only to "the ambit of the EEOC investigation that the individual's complaint might reasonably have been *expected* to stimulate." *Id.* at 115 (emphasis in original); *accord, Tipler v. E. I. DuPont de Nemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971). It has also been agreed by the Seventh Circuit Court of Appeals that

> [t]he correct rule to follow in construing EEOC charges for purposes of delineating the proper scope of a subsequent judicial inquiry is that "the complaint in the civil action . . . may properly encompass any . . . discrimination like or reasonably related to the allegations of the charge and growing out of such allegations."

Jenkins v. Blue Cross Mutual Hospital Insurance, Inc., 538 F.2d 164 (7th Cir. 1976) (en banc)[49] (quoting

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[49] The court in *Jenkins* was divided on the application of the rule where a woman alleged that she had been discriminated against because of her Afro hair style and where the charge stated that the employer accused her of being "a leader of the girls on the floor." The majority concluded that these statements in the charge properly raised both racial and sex discrimination issues even though the box denoting sex discrimination was not checked. The dissent

Danner v. Phillips Petroleum Co., 447 F.2d 157, 162 (5th Cir. 1971)).

Both above-quoted statements of the rule liberally favor pro se claimants. *Cf. Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). *But see Dupree v. Hertz Corp.*, 419 F.Supp. 764, 769 (E.D.Pa. 1976) (although EEOC charges alleged discrimination in hiring, subsequent court claims alleging discrimination in promotion, assignments, wages and other emoluments of employment were dismissed). The Third Circuit Court of Appeals has also expressed the view that, for purposes of defining the scope of the district court action, technical precision is not a requirement. *Wetzel v. Liberty Mutual Insurance Co.*, 511 F.2d 199, 202-03 (3d Cir. 1975), *vacated on other grounds*, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976). In *Wetzel* plaintiffs failed to mark a box labeled "Benefits" on the charge form although part of the district court action involved sex discrimination relating to pregnancy benefits. The court took the opportunity to observe:

> The private litigant plays an important role in the enforcement of Title VII. The EEOC was created by Congress to effectuate the goals of the Civil Rights Act of 1964 ("Act"). In 1972 the Equal Employment Opportunity Act, 42 U.S.C. § 2000e-5, provided the Commission with further authority to bring its own actions. However, the Act did not provide the Commission with direct powers of enforcement. Since enforcement lies exclusively in the federal courts, *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 359 (C.A.7, 1968), the rights of a private party, therefore, must not be barred by procedural technicalities if Title VII is to operate effectively. *Alexander v. Gardner-Denver Co.*, 415 U.S.

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felt that the statements did not suggest a pattern or practice of discrimination and that the core of the plaintiff's claim was that she was discriminated against due to her hair styling.

36, 44, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). Courts have continuously construed Title VII so as not to allow procedural technicalities to bar a claim under the Act. *Id.*

Guided by the above authorities, the appropriate conclusion is that even without the Ximines charge the pro se charge is sufficient to raise the panoply of mechanisms of the alleged employment discrimination in the present case. The allegation of referral discrimination coupled with the claim that union promises to black Benjamin Franklin trainees were broken do make clear by their very nature that systematic discrimination was being raised. Thus, it is wholly reasonable to expect that the resultant EEOC investigation would be systemwide in its attention to employment practices just as it was held in *McBride*, *supra*, to be reasonable to expect that a charge of a discriminatory discharge would require investigative review of any racially discriminatory practices.[50] In addition, because Commissioner Ximines' charge was pending (the union having been duly notified of it) and because of the connections between that charge and the pro se charge, it would not be unreasonable to

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[50] Local 542 has cited *EEOC v. Allegheny Airlines*, 436 F.Supp. 1300 (W.D.Pa. 1977). In that case a male job applicant charged to the EEOC that only females were hired as flight attendants. The Commission also investigated other practices, namely, the failure to hire and promote women and blacks to executive and technical positions. When the sex discrimination charge could not be conciliated in the Commission's view, conciliation was concluded and suit was filed by the EEOC alleging racial and sex discrimination in hiring and promotions. The court held the scope of the district court action was too broad, not because of the terms of the original charge but because the conciliation attempts were in effect limited to the allegations of that charge. (Indeed, the court observed that the Commission had not acted unreasonably in pursuing the investigation of hiring and promotion discrimination.) It is sufficient to note for present purposes that this decision has no bearing on the present action because it only deals with limitations on the power of the EEOC itself to sue after insufficient conciliation attempts.

permit the scope of this suit to be defined according to that earlier charge. Any argument that the defendants might otherwise make that permitting the suit as presently constituted is inequitable is substantially undercut by this circumstance.

In summary, the scope of plaintiffs' suit, as broad as it is in reaching into all possible areas of employment discrimination including entry into Local 542 and referral practices, is supported by the pro se charges of Williams, McKay and Muchison. This conclusion stems in part from the accepted view that technical constructions of a layman's charge are wholly inappropriate in the Title VII context and in part from the charge itself, which in alleging racial discrimination in referrals (the life-blood of the hiring hall system) and deceptive representations in connection with BFI naturally raises the question for investigation whether there might be a pattern and practice of discrimination.

The asserted lack of conciliation attempts by the EEOC serves as no bar to the plaintiffs' district court action. The pro se charging parties, two of whom filed their district court action within the requisite thirty days of receipt of their right to sue letters from the EEOC, cannot be held accountable for breaches by the EEOC of its statutory duties on any fair interpretation of the Act.

ii. The Merits of the Title VII Claim

After considering the procedural and jurisdictional objections made by defendant Local 542 to the plaintiffs' Title VII claims, it is appropriate to turn to the merits of plaintiffs' case against Local 542.

In *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), the Court held invalid under Title VII a high school diploma requirement and testing requirements for certain jobs which had the *effect* of discriminating against minorities.

> The Court of Appeals held that the Company had adopted the diploma and test requirements without any "intention to discriminate against Negro employees." . . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability. [*Id.* at 432, 91 S.Ct. at 854]

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), the Supreme Court distinguished between the *Griggs*-type "disparate impact" case and a pattern and practice suit based on "disparate treatment." *Id.* at 335 n.15, 97 S.Ct. 1843. For the former type of case, the Court confirmed that no proof of discriminatory motive is necessary, but for the latter it viewed proof of such motive as "critical." The Court's distinction is characterized by its subsequent statement that "[e]ither theory may, of course, be applied to a particular set of facts."

It is not clearly apparent that the Court's "disparate impact-disparate treatment" distinction is an absolute one rather than a relative or even nominal one. It would seem somewhat inconsistent to require proof only of discriminatory impact where a policy or procedure is innocently neutral on its face but at the same time make mandatory the frequently more difficult proof of discriminatory bias where, in the absence of any identifiably neutral policy, obvious discriminatory effects can be shown. There must be some point, indeed, at which either theory may be applied. Nevertheless, plaintiffs have argued that they satisfy all the necessary criteria of a pattern and practice suit of intentional discrimination. The present analysis will focus upon both theories.

(a) *Intentional Discrimination*

Teamsters requires that a Title VII plaintiff seeking to prove intentional discrimination establish by "a pre-

ponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Id.* at 336, 97 S.Ct. at 1855. As has been discussed above, plaintiffs' burden of proving a prima facie case of intentional discrimination may be satisfied in part or in whole by evidence showing a gross statistical disparity between a particular employer's workforce (or union's membership) and the racial composition of the relevant community population. *See id.* at 339-40 n.20, 97 S.Ct. 1843. In *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), the Court reaffirmed this view emphasizing in plain terms that for some jobs which require a special qualification the correct statistical comparison is between the racial composition of an employer (or union) and the percentage of minority persons in the labor market consisting of those persons in the community possessing the necessary qualifications. *Id.* 97 S.Ct. at 2742 n.13.

Plaintiffs have presented before this court a wide variety of statistical evidence assembled by Dr. Barnard Siskin, an experienced expert in the field of employment statistics who has demonstrated his thorough competency and credibility in this matter. As has been explained above, Dr. Siskin conservatively estimated that the minority labor pool of men between the ages of 18 and 65 constitute 11.5% of the total labor pool. Because beginners in the operating engineers trade traditionally have not and logically do not require any special educational background or prior skills, notwithstanding 542's use of educational and testing requirements in the registrant and JATC programs, there is no need to redefine the labor pool for these or other factors urged by defendants.

In light of all the factual statistical conclusions reached above, plaintiffs have established on a preponderance of the evidence that a gross statistical disparity existed. The disparity between labor pool representation and

union membership in 1971 is virtually unexplained by any theory of random selection; the chance of random occurrence is less than 1 in 10^{23}, far less than that needed to establish statistical significance. This disparity is confirmed and corroborated by other statistical analysis discussed above.

If it were necessary to rely upon these data alone, it may well be that plaintiffs' prima facie burden of intentional discrimination would be met. But other proof offered by plaintiff and credited by this court confirms in non-statistical ways the strong statistical inference of purposeful discrimination. This proof, detailed above, consists of the union activities leading to the obviation of the Philadelphia Plan, particularly the repeated gross inaccuracies with respect to calculations of the minority representation in the union, the union's treatment of minority Benjamin Franklin graduates who trained for six months in the reasonable belief that they would at least receive experience credit in the referral system, discretionary departures from legitimate entry methods disproportionately favoring white entries, tendencies to the creation of segregative methods of entry, discretionary and arbitrary referrals and the numerous instances of discriminatory actions against individual minority operating engineers. *See Casteneda v. Partida*, 430 U.S. 482, 496, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977). This total fabric of non-statistical proof, together with the statistical disparities, leads to only one conclusion—that plaintiffs' proof easily met the requirements of a prima facie case. The proof offered in rebuttal has not altered my view of the persuasiveness of plaintiffs' case.[51]

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[51] This conclusion does not run afoul of § 2000e-2(h), which states:

> it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such

(b) *Disparate Impact Discrimination*

Although *Griggs* involved facially neutral testing and educational qualifications which had the effect of excluding blacks at a much higher rate than whites, the Court was expressly guided by the view that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." 401 U.S. at 432, 91 S.Ct. at 854. The statistical nature of the proof here is somewhat different from *Griggs* in that there is no single identifiable standard which produces direct and clearly ascertainable disparate rates of membership, wages or hours. But the significance of the statistical disparity as expressed in competent expert testimony makes plain that 542's practices have produced a seriously disproportionate racial consequence. Because defendants have offered no significant evidence (in the face of this disparity) that any of the practices relating to the selection for affiliation or membership and dissemination of referrals, etc., are job related, an analogy to *Griggs* indicates that plaintiffs should prevail. *See Gibson, supra* at 1265 (holding that a claim of discrimination in a hiring hall job referral setting need not require proof of discriminatory intent).

While framing the issue in this way may seem a bit unusual, especially where the evidence of disparate effect may itself be so gross as to create an inference of inten-

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differences are not the result of an intention to discriminate because of race . . . or national origin . . . .

Teamsters held this provision to bar the conclusion that a seniority system which has the effect of perpetuating pre-Title VII discrimination but which is not itself discriminatorily motivated violates Title VII. Adherence to the experience-graded referral system, which on its face resembles a form of seniority division, has been sporadic, leaving much room for arbitrary decisionmaking. Furthermore, § 2000e-2(h) is not infringed by a decision that the union has committed a disparate impact violation of Title VII, because plaintiffs do not now argue that the referral system on its face constitutes a discriminatory practice.

tional discrimination, there is no reason to overstate the requirements of proof and thereby perpetuate an anomaly in legal theory by which the evidentiary standards become more stringent where discriminatory effects cannot be explained by an apparently innocent policy or practice. It is my conclusion, therefore, that had the plaintiffs failed to meet the rigorous burden of proving intentional discrimination, a *Griggs*-type claim was adequately proved.

b. *Section 1981 Claims Against Union*

In addition to their Title VII claim against 542, plaintiffs have argued that liability flows from 42 U.S.C. § 1981, which provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

In recent years § 1981 has emerged as an important provision in employment discrimination suits. *See, e.g., Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971). *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975), has made clear that § 1981 is not delimited by the procedural prerequisites of Title VII. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 & n.7, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1973).

What has remained undecided by the Supreme Court is the appropriateness of specifically analogizing between the standards of proof required under Title VII, including the standard by which only a disparate impact need be shown, and those under § 1981. Although the foregoing finding of intentional discrimination on the part

of 542 with respect to plaintiffs' Title VII claim is decisive under § 1981 as well, it remains to be examined whether § 1981 also permits a finding of discrimination upon proof of disparate impact alone.

The leading case holding that a § 1981 claim requires only proof of discriminatory impact is *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *cert. granted*, 437 U.S. 903, 98 S.Ct. 3087, 57 L.Ed.2d 1132 (1978). That case in effect adopted for § 1981 purposes the rationale of *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), that facially neutral employment practices which produce a disparate racial effect are actionable under Title VII. Both *Griggs* and *Davis v. County of Los Angeles* involved employment test procedures and requirements which were not validated as job-related. Specifically, *Davis v. County of Los Angeles* enjoined the use of a non-validated standardized test and a 5'7" height requirement for fire department employees. Both the test and the height requirement caused a disproportionate exclusion of Mexican-American job applicants.

Davis v. County of Los Ageles is significant in that it comes after *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), which expressly denied relief from an alleged discriminatory police employment testing procedure in the absence of proof of discriminatory motive. Although *Washington* did not involve a Title VII claim, the Court's holding did specify that the denial of relief was based on constitutional (fourteenth amendment equal protection clause) and *statutory* grounds: "Respondents were entitled to relief on neither constitutional nor statutory grounds." *Id.* at 248, 96 S.Ct. at 2052. Justice Stevens, concurring in part, observed that the "actual statutory holdings are limited to 42 U.S.C. § 1981 and § 1-320 of the District of Columbia Code . . . ." *Id.* at 255, 96 S.Ct. at 2055. An argument does exist, therefore, that *Washington* may have foreclosed the issue, requiring that discriminatory motive

be proven as a prerequisite to § 1981 relief. However, the Ninth Circuit in *Davis v. County of Los Angeles* distinguished *Washington* first by citing to apparent limitations in Justice White's majority opinion:

> Mr. Justice White prefaced Part II of the majority opinion with this statement: "Because the Court of Appeals erroneously applied the legal standards applicable in resolving the *constitutional issue* before it, we reversed . . . ." *Id.* at 239, 96 S.Ct. at 2046 (emphasis added).

566 F.2d at 1339. The thrust of the Ninth Circuit's rationale is that *Washington* never specifically discussed the § 1981 considerations and hence did not decide the scope of § 1981 liability. The court stated: "In the absence of any express pronouncement from the Supreme Court—a pronouncement not delivered in *Washington*—we are unwilling to deviate from this established practice [of equating Title VII with § 1981]." 566 F.2d at 1340.

It is interesting to note, however, that the dissenting judge on the Ninth Circuit's panel (Wallace, J.), while agreeing that *Washington v. Davis* was not decisive as to the § 1981 claim, stated that the legislative history of § 1981 should track the fourteenth amendment's standards of proof. Section 1981 was, however, first enacted pursuant to the thirteenth amendment before passage of the fourteenth amendment. It was then simply reenacted in 1870 after the fourteenth amendment's passage to reassure that its provisions would not be held unconstitutional. Hence the linkage between the elements of a § 1981 cause of action and those of an action based on the equal protection clause seems unfounded. I therefore adopt the view that a § 1981 employment discrimination claim may be proven on roughly the same basis as a Title VII claim, including proof of disparate impact alone. In this view I agree with the majority in *Davis v. County of Los Angeles* and add that § 1981's close

connection to the thirteenth amendment amply distinguishes the fourteenth amendment decision in *Washington.*[52]

c. *Section 1985(3)*

Another legal aspect of plaintiffs' case focuses upon the alleged conspiracy among the union, associations and contractors to discriminate intentionally against minorities. Because this claim depends largely upon the involvement of the associations and contractors, full discussion will await the consideration of their liability below.

2. *Claims Against Associations and Contractors*

a. *Section 1981*

While I have found the union liable under § 1981, a separate adjudication must be made as to whether the union's conduct in operating the hiring hall has caused the associations and contractors to be liable under that section. The evidence is not clear as to the quantum of specific and personal knowledge which the contractors and their associations may have had of the union's acts of intentional discrimination or the impact of their hiring hall policies. The fact is that the vast majority of individual contractors never hired a minority operating engineer; that the GBCA, CAEP, PECA and UCA signed a statement, relevant to federal approval of the "Affirmative Action Program" displacing the Philadelphia Plan, grossly exaggerating minority union membership; and that the gross disparity between the percentage of the minority representation in the labor pool and minority representation in the union along with a gross disparity in hours and wages of minorities as against the minority labor pool percentage is a matter of such broad scope that some or all contractors and associations

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[52] Because of the JATC's participation in the overall intentional discrimination of the union, there is no need to discuss its legal liability separately. The JATC is liable as the union is liable.

might have had knowledge of it. Yet I find that the plaintiffs have failed to prove on a preponderance of the evidence that the associations or contractors viewed simply as a class were actually aware of the union discrimination affecting the employment of minority persons throughout the operating engineer industry in Local 542's jurisdiction. Such knowledge with actual participation in the hiring hall system would of course itself constitute intentional discrimination. I also find that not *all* contractors and associations may be said as a class to have had reasonable notice of the union's discrimination in view of the great number of contractors and the varying size and intensity of their work. Nevertheless, I find that the contractors and associations are injunctively liable to the plaintiff class under § 1981 as a result of their contractual relationship to and use of a hiring hall system which in practice effectuated intentional discrimination, whether or not the employers and associations knew or should have known.

Although no case has been found which imposes civil rights liability on the employer or association in these precise circumstances, there are several cases in which acts by union hiring halls favoring union members in violation of 29 U.S.C. § 158(a) of the National Labor Relations Act have created liability in an employer who had neither knowledge nor reasonable notice of such acts. There are a few district court decisions in civil rights contexts, however, which hold or suggest that no such extension of liability from union to employer may be made. Added to this legal fabric are cases which, in interpreting the scope of Title VII or § 1981 liability, have held employers liable for the discriminatory impact of facially neutral terms of a collective bargaining agreement governing a hiring hall's operation.

My conclusion that as to the § 1981 claims the association and contractors can be liable for at least injunctive relief is predicated on my analysis of: (1) the analogous National Labor Relations Act cases; (2) the

lower court Title VII and § 1981 decisions involving an employer who had no knowledge or reasonable notice of hiring hall discrimination against minorities; (3) Title VII cases in which an employer's agreement to a facially neutral hiring hall system had a discriminatory impact; and (4) cases and principles relating to the applicability of *respondeat superior* liability under § 1981.

1. *The NLRA Cases*

The plaintiffs seek to hold the class of defendant contractors liable vicariously for the acts of the union in its hiring hall operation. The rationale for such a view is that the employers by agreeing to a hiring hall arrangement have made the union their agent in hiring. *See NLRB v. H. K. Ferguson Co.*, 337 F.2d 205, 208 (5th Cir. 1964), *cert. denied*, 380 U.S. 912, 85 S.Ct. 898, 13 L.Ed.2d 798 (1965); *Morrison-Knudsen Co., Inc. v. NLRB*, 275 F.2d 914, 917 (2d Cir. 1960) (Swan, J.), *cert. denied*, 366 U.S. 909, 81 S.Ct. 1082, 6 L.Ed.2d 234 (1961); *cf. NLRB v. United States Steel Corp.*, 278 F.2d 896, 898 (3d Cir. 1960) (*en banc*), *cert. denied*, 366 U.S. 908, 81 S.Ct. 1083, 6 L.Ed.2d 234 (1961). I am persuaded by the rationale expressed most clearly in *Morrison-Knudsen* and hold that that rationale is applicable to the instant § 1981 action.

Morrison-Knudsen involved discrimination by the union hiring hall against non-union workers. Such a practice was and is forbidden by 29 U.S.C. § 158(a)(1). The court's view was expressed in the following quotation:

> [*R*]*egardless of the extent of their* [*the employers'*] *knowledge* we agree with the Board that an employer may not avoid liability for violations of the Act by the hiring hall when he has turned over to it the task of supplying the men to be employed. The Local acted as agent for the petitioners in selecting the men to be hired. Its discriminatory acts, which unlawfully encourage membership in Local 545, are

> properly chargeable to the agent's principal as discriminatory acts by it. [275 F.2d at 917 (emphasis added)]

See H. K. Ferguson, supra, at 208.[53] Although not discussing the basis for its agency conclusion in detail, it seems clear that the *Morrison-Knudsen* court was concerned with the federal policy implications of immunizing an employer from liability for violations of the NLRA arising out of a function so typical to employers.

Of course, *Morrison-Knudsen's* expression of a vicarious liability rule has not been followed by all courts of appeals. *NLRB v. Master Stevedores Association of Texas*, 418 F.2d 140 (5th Cir. 1969) (Godbold, J.), and *Lummus Co. v. NLRB*, 119 U.S.App.D.C. 229, 339 F.2d 728 (1964), emphasize that *Morrison-Knudsen* prefaced its statement of the vicarious liability with the following observation:

> While there is some dispute as to the extent of the petitioners' knowledge of the Local's discriminatory practices, it seems clear at least they knew of the collection of "dobie" [a license fee for non-union workers]. [*Id.* at 917]

However, in its footnote 6, the court in *Morrison-Knudsen* explained the basis for its conclusion that the employers knew of the "dobie", quoting testimony, apparently by some managerial official, that he told all stewards that no dues, subscriptions, donations, or "dobie" were to be collected on the job. Although this evidence might have shown knowledge that some fee was re-

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[53] In *Ferguson* the court stated that by making the union its exclusive hiring hall it "made Goodman [the union's business agent] its agent in determining . . . eligibility for employment and by doing so became liable for any unfair practices committed by Goodman in connection with his hiring or refusing to hire." *Id.* at 208. Although there is no discussion of the employer's knowledge of the specific discriminatory referral revocations involved in *Ferguson*, the court also described the employer's involvement as "condoning" or "acquiescing" in encouragement of union membership.

quired of non-union workers or workers from other unions by the local operating the hiring hall, the court's finding of discrimination appears to have rested in part on the proven fact that the "dobie" was higher than the dues charged of union members, and there is no indication that the employer knew of the discriminatory amount of the fees. The court also affirmed the finding that the union operating the hiring hall discriminated by giving direct preference to its union members in referrals. Certainly knowledge of "dobie" is not knowledge of such preference. Thus it seems inescapable that the reason *Morrison-Knudsen* expressed its vicarious liability foundation was that the knowledge of "dobie" alone simply did not constitute adequate knowledge or notice of the discrimination alleged.[54]

Master Stevedores, supra, in requiring a knowledge or reasonable notice standard did not attempt a searching analysis of *Morrison-Knudsen's* knowledge reference. But in *Pacific Maritime Association v. NLRB*, 452 F.2d 8, 10 (9th Cir. 1971), the court was unwilling to minimize *Morrison-Knudsen's* vicarious liability holding. In that case, involving hiring hall discrimination against non-union workers, the court found that an employer association knew or should have known of the discriminatory union practices.

In a slightly different NLRA context, the Third Circuit in *NLRB v. United States Steel Corp.*, 278 F.2d 896, 898 (3d Cir. 1960) (en banc), *cert. denied*, 366 U.S. 908, 81 S.Ct. 1083, 6 L.Ed.2d 234 (1961), also held an employer liable for union favoritism via a hiring hall system where a union master mechanic, already in the employ of a contractor, was permitted to select union members to fill vacant positions at the employer's plant. Although the employer did not sign the bargaining agree-

[54] The court reversed an order by the NLRB requiring the employer to reimburse all illegal union dues. The court pointed out that this would impose an unfair burden on the employer and permit the union to retain the funds illegally received.

ment which empowered the master mechanic to make selections, it did acquiesce in following that procedure. The court stated:

> We think the Board was justified in concluding that, *as a result of the Master Mechanic's dual capacity as agent for both American Bridge and Local 542, both employer and union were responsible for the hiring procedures employed.* [*Id.* (emphasis added).]

United States Steel is a case in which the court reached the conclusion that a union's hiring method could create liability in the employer on a theory of agency.[55]

In summary, I find the *Morrison-Knudsen* rationale to be applicable here. The decision in *United States Steel* that a master mechanic was agent for both the employer and the union further indicates the appropriateness of finding the hiring hall an agent of the employer in an NLRA setting. I see no reason—statutory or policy—why this conclusion should be any different in a civil rights setting.

2. *Civil Rights Cases Rejecting Vicarious Employer Liability*

In contrast to the rationale of *Morrison-Knudsen*, defendants rely on certain § 1981 and Title VII cases which purportedly hold that there can be no automatic

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[55] The court in *United States Steel* also concluded that the employer participated in an illegal discriminatory arrangement although it did not expressly find that the employer had knowledge of any discriminatory provision. The NLRB decision, 122 NLRB No. 155, reveals that an employer-manager tried to have non-union workers hired by the master mechanic. The NLRB nevertheless found the arrangement to be "in effect" an agreement to operate under closed shop conditions. *Id.* at 1325. In the present case, although there has been no allegation that the bargaining agreement is itself discriminatory and hence although there is some possibility that there was no analogous "illegal arrangement," the court's analysis of the agency issue seems immediately instructive.

employer liability upon proof of a union's discriminatory operation of a hiring hall. *Allen v. Pipefitters Local Union No. 208*, 56 F.R.D. 473 (D.Colo.1972) and *Vogler v. McCarty, Inc.*, 294 F.Supp. 368 (E.D.La. 1968) *aff'd on other grounds sub nom. Local 53 v. Vogel*, 407 F.2d 1047 (5th Cir. 1969). While I recognize that these cases are partially in conflict with my holding that employers are liable for the acts of a hiring hall, I find them to be unpersuasive and, in some respects, factually and analytically distinguishable.

In *Allen*, a § 1981 and Title VII case, the court held that two employers' associations were not rendered liable by entering into a collective bargaining agreement with a union where the agreement provided that the union would operate an exclusive hiring hall and where the alleged discriminatory acts by the union did not arise out of the terms of the agreement. The acts of discrimination alleged against the union related to internal membership policies and consisted of the following: limitations on the number of new members; use of non-validated written tests; a requirement that an entrant be recommended by a union member; a subjective evaluation by an Executive Board; and a requirement that entry be approved by an affirmative voice vote of the membership. The court concluded:

> The essence of the allegations as to these associations is that they are parties to a collective bargaining agreement executed with Local 208 and hire virtually all of their employees by referral from Local 208's Hiring Hall.
>
> These allegations are not sufficient to state a claim against the associations . . . . [56 F.R.D. at 474-75]

Notably, the court cited to no authority in reaching this result.

In *Vogler*, the court in similar circumstances stated that two employers could not be held liable under Title

VII for the discriminatory membership policies of the union which, under the collective bargaining agreement, operated an exclusive hiring hall for the employers. The court expressed its view of the positions of the employers:

> Local 53's operation of a hiring hall arrangement which, together with its membership admission policies, have controlled employment within the insulation industry in the New Orleans and Baton Rouge areas and has resulted in discrimination against Negroes and other minority groups seeking employment . . . through the Union's hiring hall does not result in a viclation of Title VII . . . by employers who are required to accept for employment only those union members or persons to whom the union issues work permit cards. [294 F.Supp. at 374-75]

The court simply did not believe that the hiring hall agreement in any way created a responsibility in the employers for its execution. As in *Allen*, the court here cites no authority for this legal conclusion.

Vogler is an extremely difficult case to analyze in detail because the court's opinion seems incomplete. It does appear clearly, however, that three private claimants (Vogler, Galaviz, and Joseph) sought to join two employer companies (McCarty and Branton) to a suit by the United States under Title VII for a preliminary injunction against a union based on hiring hall discrimination. Most of the claims in *Vogler* were dismissed or dismissable for lack of jurisdiction. With this in mind, and given the lack of citational authority on the nonjurisdictional dismissal, *Vogler* in and of itself is unpersuasive.

Three other cases also reach conclusions which nonparties have construed as consistent with the holdings in *Allen* and *Vogler*. These cases are: *Rios v. Enterprise Association Steamfitters*, 400 F.Supp. 988 (S.D. N.Y.1975), *aff'd in part rev'd in part sub nom. EEOC v.*

Enterprise Association Steamfitters, 542 F.2d 579 (2d. Cir. 1976), *cert. denied*, 430 U.S. 911, 97 S.Ct. 1186, 51 L.Ed.2d 588 (1977); *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974); and *Byrd v. Local Union No. 24*, 375 F.Supp. 545 (D.Md.1974).

In *Rios* the court was presented with a motion for back pay after a "protracted litigation under Title VII." 400 F.Supp. at 990. Plaintiffs sought an award of damages from a contractor's trade association and the court denied the request:

> MCA, a trade association of certain contractors in the New York area, acts only in collective bargaining negotiations between its members and Local 638. MCA does not employ steamfitters; rather, employment is done by its members [without a hiring hall]. While MCA was found to have been properly made a party defendant in the *Rio* action . . . [*United States v. Local 638*, 360 F.Supp. 979, 994-95 (S.D.N.Y.1973) (Bonsal, J.)] that finding did not imply that MCA was "responsible *ipso facto* for all the employment . . . practices here found unlawfully discriminatory or . . . liable in damages to the plaintiffs in *Rios*. Plaintiffs have shown no specific instances of MCA discrimination . . . ."

Id. at 992. The court, in the earlier opinion (360 F. Supp. 979) quoted from above, did include the association as a Title VII defendant and did include it in its order for future action to correct a lack of non-white employment in the building trades industry.[56] 360 F. Supp. at 996. The court pointed out in that same opinion:

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[56] The Second Circuit's opinion summarized the affirmative action order, 542 F.2d at 589:

> MCA was enjoined from further discrimination and ordered to maintain up-to-date records of available work, to submit an affirmative action program, to use its best efforts to provide apprentices with 1,750 hours of work per year and to maintain an employment register.

> MCA has greater influence over and responsibility for employment practices applying to the industry as a whole than any single employer. Moreover, the participation of MCA in an affirmative action program is a necessity if the steamfitting industry is to correct the discriminatory effects of past employment practices.

Id. at 995.

The district court decision in *Rios* can only truly be said to relate to the inappropriateness of a back pay award against an association where that association has not itself been proven to have actively discriminated. Inferentially, this means that in *Rios* the discriminatory acts of the union (not found to be intentional) would not be imputed for purposes of back pay to an association of contractors which acted primarily in negotiating bargaining agreements and which committed no specific acts of discrimination of its own.

But in affirming this aspect of Judge Bonsal's decision, the Second Circuit Court of Appeals in *EEOC v. Enterprise Association Steamfitters, supra*, was circumspect on the issue of absolving the MCA from back pay liability. The plaintiffs argued that, by enjoining MCA, the district court must have found a sufficient basis for holding the association to account for discrimination; that same basis, they argued, must perforce support of an award of back pay. The Court of Appeals added:

> The *Rios* plaintiffs argue, not without reason, that this [injunctive] relief could not have been ordered absent a finding of discrimination by MCA, purposeful or otherwise, and that all that is required to establish MCA's liability for backpay is the finding of discrimination; indeed, mere acquiescence in the discriminatory acts of the union would render it liable. [Citations omitted] *Absent any specific finding of discrimination*, however, we conclude that *the district court's finding of nonliability* on the part of

> MCA *is not an abuse of discretion. Guerra v. Manchester Terminal Corp.*, 498 F.2d at 655-56. [542 F.2d at 589 (emphasis added)]

It may be inferred from the above dictum that acquiescence (presumably involving some meaningful level of knowledge or notice) constitutes sufficient involvement by a contractor's association to require holding it liable for back pay relief under Title VII. But it may be infererd from the holding that either back pay liability or injunctive liability without back pay may be imposed in the absence of "acquiescence" and without specific discriminatory acts in the discretion of the trial court. Certainly neither the district court opinion nor the Court of Appeals' opinion in *Enterprise Association Steamfitters* supports the conclusion that an association or employer bearing a legal contractual relation to a union is insulated from liability for the union's discriminatory acts in the absence of participation in or knowledge of such acts. Indeed, the Court of Appeals' affirmance of injunctive liability in the absence of "any specific finding of discrimination" supports an opposite conclusion

The decision in *Guerra, supra*, is likewise distinguishable from *Vogler* and *Allen*. *Guerra* was a case in which a union was held exclusively liable under § 1981 for backpay because of discriminatory hiring hall practices against aliens. In that case the employer entered into a collective bargaining agreement giving hiring hall preference to United States ciitzens. Both the union and the employer were found to have violated § 1981. The district court, however, *in its discretion* imposed damages liability on the union alone because of its view that the union was principally at fault. Thus, *Guerra* supports the view that employers' monetary liability for hiring hall violations may be subordinated to the union's liability even where the terms of the collective bargaining agreement itself are discriminatory in pur-

pose. But *Guerra* does not as a matter of law absolve employers in all such circumstances, nor does it speak to the issue whether an employer may ever be held liable injunctively or monetarily for discriminatory union acts not rising out of a bargaining agreement's terms.

The case of *Byrd v. Local Union No. 24, supra*, also falls short of supporting the holdings in *Allen* and *Vogler* that an employers' association, and inferentially an employer cannot be held liable absent knowledge or notice of a union's discriminatory acts in operating a hiring hall under a lawful collective bargaining agreement. The court first turned to an officially unpublished bench opinion in *McFadden v. Baltimore STA*, Civ. No. 71-457-H, bench opinion (D.Md. July 7, 1972) (8 F.E.P. 391), which apparently held that a trade association could not be held liable for union discrimination where the association merely agreed to a union hiring hall. In *Byrd* the plaintiff alleged

> that the respective contractor associations have knowledge of the alleged actions taken by their agents, the JATCs, which discriminate against the plaintiffs and their putative class on account of their race and that the alleged discriminatory acts [footnote omitted] of their respective agents, the JATCs, have been ratified and encouraged by the contractor association. . . . A final allegation is that the defendant contractor associations have engaged in discriminatory collective bargaining agreements with the . . . unions . . . . [375 F.Supp. at 560-61]

The court, considering the case on a motion to dismiss, distinguished *McFadden* and *Allen* saying "the alleged liability of the contractor associations is based upon their own respective acts vicariously performed by their alleged agents . . . ." *Id.* at 562. The importance of *Byrd* as possible support for the *Allen* and *Vogler* position (that an employer or association of employers is not liable vicariously for discrimination by the union

in a hiring hall) is diminished because of the allegations in *Byrd* of *direct* acts by the employer association.

In summary, *Vogler* and *Allen*, although directly rejecting a vicarious liability theory in a civil rights context, do not represent a decisive analysis of the issues and cite no authority for their holdings. *Byrd*, while in apparent agreement with the *Allen* and *Vogler* position, did not have to reach the issue of vicarious liability because of allegations of direct acts by the employer associations.

In *Rios*, a slightly different type of case, the district court's decision was to absolve an association of monetary (but not injunctive) liability where no act by the association was shown to be connected to the union's hiring discrimination. On appeal, that aspect of *Rios* was affirmed with the observation that acquiescence by an association would provide a sufficient basis for back pay liability but that because no specific act of discrimination was proven against the agency the refusal by the district court to hold it liable for back pay was not an abuse of discretion. Similarly, *Guerra* was a case in which the Court of Appeals declined to view as an abuse of discretion the district court's refusal to require an employer to pay monetary damages under § 1981 where, although both employer and union agreed to a hiring hall system which was itself discriminatory, the union was principally responsible.

In view of this reading of the civil rights cases involving a union hiring hall, there is no persuasive reason to reject the theory of vicarious liability of employers for discrimination by the union in its hiring hall operation. Indeed the Second Circuit Court of Appeals decision in *Enterprise Association Steamfitters* supports the vicarious liability theory.

3. *Cases In Which an Employer or Employer's Association Was Held Liable for Discrimination Arising From Terms of Contract*

There do exist cases in which, either under Title VII or § 1981, participation in a collective bargaining agreement having a discriminatory impact justified imposition of liability upon an employer, an employer association or a union, even though there was no specific showing of an intent to discriminate. *E.g., Myers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir.) *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977); *Carey v. Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Robinson v. Lorillard*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); *National Organization for Women, Inc. v. Minnesota Mining and Manufacturing Co.*, 73 F.R.D. 467 (D.Minn. 1977). Each of these cases, however, involved seniority systems arising under the collective bargaining agreement and in each of the cases it was the seniority system which was said to have perpetuated past discrimination. Importantly, these cases were decided prior to the Supreme Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), which upheld as lawful seniority systems of a bona fide character though they may in effect perpetuate pre-Act discrimination.[57]

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[57] The basis for this holding was the interpretation given to 42 U.S.C. § 2000e-2(h), which provides in part as follows:

> Notwithstanding any other provision of this sub-chapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race . . . or national origin . . . .

Nevertheless, the above-cited cases still have important precedential impact. Apart from the narrow question whether a bona fide seniority system provided for by contract is statutorily exempt from liability, these cases instruct that all parties to a collective bargaining agreement which by its terms has a discriminatory impact can bear civil rights responsibility.

It must be emphasized that these decisions do not explicitly resolve the question whether under § 1981 a union hiring hall's acts may be imputed to an employer for liability purposes in the absence of proof of knowledge, notice or intent. The cases are decided either under Title VII, which according to *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), creates liability merely from discriminatory effects of facially neutral hiring practices, or under § 1981 with the view (as accepted here) that liability requires no proof of purposeful conduct on the part of any of the defendants. These cases give analytical support to plaintiffs' vicarious liability theory in the present case.

In *Myers* for instance, a case in which tht court found that a facially neutral seniority system provided for in the collective bargaining agreement had a discriminatory impact on transfers, 544 F.2d at 848, the court affirmed the district court's holding that the union and the employer should share backpay liability while reserving for the completion of a Stage II proceeding the question of the exact apportionment of backpay between them. The *Myers* court also held an international union liable under Title VII and § 1981 because one of its representatives attended negotiations between the employer and the local during one contract session and because the resulting contract was (as was the previous one) approved by the international's president. The court, referring to the liability of the international, observed:

> Labor organizations, as well as employers, have an affirmative duty to take corrective steps to prevent the perpetuation of past discrimination. [Citations

> omitted.] "It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to elimiate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 . . . (1975). [*Id.* at 850-51]

The court's reference to an affirmative duty is most significant. It would appear that even where the party to a collective bargaining agreement foresees and intends no discrimination, if a term in that agreement discriminates in impact, he is still to be held liable. In other words, the duty described in *Myers* is a duty to be aware of potential discriminatory impact resulting from an agreement which does not on its face reflect any discrimination at all.

Carey v. Greyhound Bus Co., Inc., supra, also involved a facially neutral but in effect discriminatory seniority provision. Once again holding all parties liable, the court stated:

> [U]nion contracts grant no immunity on the subject of racial discrimination. Neither can the employer use the union or unions for a shield. . . . Writing in *Peters v. Missouri-Pacific R.R. Co.*, [483 F.2d 490 (5th Cir. 1973)] Judge Godbold said:
>
> > "Even if the railroad's intent in agreeing to and enforcing the challenged employment agreement was a racially neutral, or even benevolent, desire to discharge its legal duty to bargain with the plaintiffs' representative and to enforce the contract entered into, such intent does not save the agreement from the terms of Title VII if it operates to 'freeze' the status quo of prior discriminatory employment practices." [500 F.2d at 1377]

The policy expressed in *Carey*, a case which was one of the building blocks for *Myers*, suggests an absolute liability theory.

Robinson v. Lorillard, a case also involving a facially neutral seniority system, seems consistent with this interpretation:

> The rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert. Title VII requires that both union and employer represent and protect the best interests of minority employees. Despite the fact that a strike over a contract provision may impose economic costs, [footnote omitted] if a discriminatory contract provision is acceded to the bargainee as well as the bargainor will be held liable. [444 F.2d at 799] [58]

Acknowledging that in each of the above cases the union and employer are interconnected via the bargaining agreement, which *itself* is the cause of the discriminatory impact in violation of § 1981 or Title VII, these decisions make an important point. If the state of mind of the parties, being presumed neutral, cannot establish a defense to a Title VII or § 1981 violation, it is a short conceptual step to hold liable an employer who agrees to a facially neutral agreement with a union who proceeds to create a discriminatory impact by acting (intentionally or not) outside the agreement. It may be said that an employer's duty to insure that the terms of a

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[58] A recent Fifth Circuit decision in the area is *James v. Stockham Valves & Fittings*, 559 F.2d 310, 353 (5th Cir. 1977) (Wisdom, J.). In this case the court was faced with a seniority term, not bona fide, which impacted discriminatorily. The court also found discriminatory purpose on the part of the employer. But the court remanded on the question of the union's liability, notwithstanding that the union had agreed to the collective bargaining contract. The court was obviously influenced by the union's strong efforts to eliminate the discriminatory provisions. Those circumstances are not present here, however, for the employers and associations have taken no meaningful steps to see that discrimination is resisted.

neutral agreement will not have discriminatory effects is different from the duty to see that no discrimination takes place outside the agreement. But that distinction does not seem meaningful where the alleged union discrimination arises from so important a feature of a collective bargaining agreement as the day-to-day operation of an exclusive hiring hall.

In a case involving discrimination that is given effect by the hiring hall, it might quite as forcefully be said that the union and employer have an "affirmative duty" to prevent discrimination and that the employer cannot use a union "for a shield."

4. *Doctrine of Respondeat Superior*

Respondeat superior, a doctrine centuries old, is predicated on the assumption that a master, employer, or principal will be held responsible for the acts of a servant, employee, or agent respectively. The rationale for this view is succinctly expressed by the maxim, *qui facit per alium facit per se* (he who acts through another acts himself). *See, e.g.*, 3 Am.Jur.2d *Agency*, § 261, at 626-27 (1962). In the instant case the issue is whether the acts of the union representatives at the hiring hall were, as a matter of law, also the acts of the contractor associations and the contractors who had agreed to this exclusive hiring system. At the outset we are confronted with a line of cases in which some lower courts appear to have held broadly that the concept of *respondeat superior* does not apply in civil rights cases. Thus we must examine, first, whether a defendant in a civil rights action should be exempt from vicarious liability and then we must consider whether the doctrine of *respondeat superior* is on its own terms applicable in the present setting.

(a) *Analogies to Civil Rights Suits Against Municipalities or Supervisory Personnel*

As observed above, it has sometimes been stated axiomatically that *respondeat superior* does not apply in

civil rights cases. *E.g., Cochran v. Rowe*, 438 F.Supp. 566 (D.Ill. 1977)); *Taylor v. City of Selma*, 327 F.Supp. 1191 (S.D.Ala. 1971); *Sanberg v. Daley*, 306 F.Supp. 277 (N.D.Ill. 1969) (differentiating between monetary and injunctive relief). The courts in these cases, however, and in many of the cases articulating the seeming "axiom," were confronted with the question of the liability of a municipal entity under § 1983 for acts of its agents. Each case was decided prior to *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and was therefore predicated on the holding of *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), that because municipalities were not persons for purposes of § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3), they were absolutely immune from liability under that section. The rejection of vicarious liability contained in these lower court decisions does not signify a general inapplicability of vicarious liability in civil rights cases which were never subject to the jurisdictional limitations of the Civil Rights Act of 1871, § 1983's precursor.

Since *Monell*, of course, municipalities, while still not subject to vicarious liability, may be sued under § 1983 for infringements of civil rights arising from a municipal policy, custom or act. Although overruling *Monroe*, *Monell* confirms that in a § 1983 suit against a municipality, *respondeat superior* is unavailable specifically because of statutory language and legislative history having no bearing on § 1981. *In Monell*, the Supreme Court expressly hinged its rejection of *respondeat superior* in § 1983 suits against a city on "Congress' rejection of the only form of vicarious liability presented to it" (*i.e.*, the proposed Sherman amendment) and on "the absence of any language in § 1983 which can easily be construed to create *respondeat superior* liability." *Id.* 98 S.Ct. at 2037, n.57. Of course, the rejection of the Sherman amendment imparts no significance for § 1981 whose precursor was the Act of 1866. *Mahone v. Waddle*, 564

F.2d 1019, 1030-36 (3d Cir. 1977). Furthermore, whereas § 1983 is phrased as a prohibition which might be construed to be applicable only to individual actors,[59] § 1981 is phrased so as to grant broadly a positive right and creates no comparable inference. Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

In addition to cases involving suits against municipalities, there is also a line of cases under § 1983 (raising the vicarious liability issue) in which supervisory police, prison or other governmental officials are defendants. Typically, *respondeat superior* is rejected. *E.g.*, *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1082 (3d Cir. 1976); *Milton v. Nelson*, 527 F.2d 1158 (9th Cir. 1976) (§§ 1981-1983); *Johnson v. Glick*, 481 F.2d 1028, 1034 (2d Cir.) (Friendly, J.) (limiting holding to damage claims), *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 32 (1973); *Jennings v. Davis*, 476 F.2d (8th Cir. 1973); *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971). *But see Holland v. Connors*, 491 F.2d 539 (5th Cir. 1974).[60] The Supreme Court in *Rizzo v. Goode*, 423

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[59] 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[60] Another less familiar setting in which vicarious liability claims have been raised is in § 1983 or § 1985 cases in which private

U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), confirmed that at least with respect to equitable decrees against police department officials, where considerations of comity arose, liability may not be founded on a vicarious liability theory. But as was pointed out by the Third Circuit in *Rizzo v. Goode*, 506 F.2d 542 (3d Cir. 1974), *rev'd on other grounds*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), the theory of vicarious liability is inapplicable on its own terms in such situations and is not rendered inapplicable by any peculiarly civil rights related rationale. The Third Circuit Court of Appeals observed:

> *Respondeat superior* is not applicable in its traditional sense since the defendant officials are not employers. Both subordinates and officials are employees of the governmental unit. [*Id.* at 550]

See, e.g., Kite v. Kelley, 546 F.2d 334, 337 (10th Cir. 1976).

Because of the complete inapplicability here of considerations of federal-state comity, absolute municipal immunity, and immunity of governmental supervisory personnel, the above-listed cases purporting (or seemingly purporting) to exclude *respondeat superior* liability from civil rights cases properly have no bearing on the present issue.

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parties are alleged to have participated with state officials. Two such cases are *Draeger v. Grand Central, Inc.*, 504 F.2d 142 (10th Cir. 1974), and *Croy v. Skinner*, 410 F.Supp. 117 (N.D.Ga. 1976).

In *Draeger* an off-duty police officer was serving as a security guard for a private store. Although off-duty, the policeman still had authority to make police arrests. Considering the question whether the employer-store was liable for the alleged illegal arrest by their security guards, the court held that *respondeat superior* was not applicable. However, in *Croy v. Skinner*, 410 F.Supp. 117 (N.D.Ga. 1976), Judge Freeman stated a more expansive approach. Relying on *Carter v. Estelle*, 519 F.2d 1136 (5th Cir. 1975), he said that upon an allegation of conspiracy under § 1985 between bank officials and state officials to instigate a false prosecution the bank which employs the involved officials could be liable vicariously.

This conclusion is further compelled by the Third Circuit's recent decision in *Mahone v. Waddle*, *supra*, reversing the dismissal of a *respondeat superior* § 1981 claim against the city of Pittsburgh. That decision, pointing out the inapplicability of the legislative history of the Act of 1871 (the precursor of § 1983) makes clear that traditional vicarious liability theories do indeed apply in actions under § 1981. The factual distinction between the present employment discrimination case and the police brutality allegations which were the basis for suit in *Mahone* cannot alter this basic conclusion. The vitality of *Mahone*, furthermore, is not diminished by the Supreme Court's recent decision in *Monell*.

Based upon the foregoing analysis, I conclude that the plaintiffs' claim under the "contracts" component of § 1981 may properly be based on a *respondeat superior* theory, at least to hold the defendant class of employers and the associations injunctively liable for the discrimination by the union in the hiring hall.

(b) *The Application of the Doctrine of Respondeat Superior*

Under every test of agency the union hiring hall was the agent for two principals—the union and the contractors, with their respective associations. After the contractors delegated authority to the persons operating the hiring hall, can the contractors and associations now be granted absolute immunity from the illegal acts of the hiring hall?

The union hiring hall was, after all, designed to supply the employers with workers and replace the traditional system of direct applications. There is no suggestion here that such delegation is of itself improper, but once it is made the employers relying on it cannot absolve themselves of all responsibility for that delegation even if they are unaware that their collective workforce is the product of intentional discrimination. Nor is it enough that the employers and associations might

have liked to avoid a hiring hall system but were forced to acquiesce due to economic considerations. Economic considerations affecting bargaining process raised here by defendants to not provide an excuse from duties incident to employee selection in this case. *See Lorillard, supra.* Indeed, the employers, particularly through their associations, had the potential collective capacity to be generally conscious of possible discrimination in the hiring hall and to seek to correct it by enforcing the provisions governing the operation of the hiring hall or (at least after May, 1971) by enforcing the non-discrimination provision of the contract. The employers could have taken other actions designed to dissuade the union from a pattern and practice of discrimination in carrying out its duties to supply the employers with operating engineers. The evidence reveals they did nothing whatsoever. The delegation of the employee application process to 542 simply did not effect a withdrawal from reality. *See Carey, supra; Lorillard, supra.*

There is clear support in Restatement (Second) of Agency for the view which in effect underlies the conclusion reached in *Morrison-Knudsen* and to some extent in *United States Steel,* that a relation can exist between an employer or group of employers and an exclusive union hiring hall rendering applicable the rationale of vicarious liability.[61] Analogy to Section 214 of the Re-

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[61] Section 1, Restatement (Second) of Agency (1958), states:

(1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

(2) The one for whom action is to be taken is the principal.

(3) The one who is to act is the agent.

In serving as an exclusive hiring hall Local 542 was certainly acting on behalf of its members but was also acting on behalf of the employers in replacing traditional direct employment application processes. The bargaining agreement, either signed by the employers or otherwise adopted, manifests the requisite mutual consent. As to the right of control, the important issue is whether

statement (Second) of Agency is instructive, keeping in mind that an employer can no more easily shed his legal duty under § 1981 than under Title VII not to practice intentional discrimination or produce a discriminatory impact through facially neutral practices in the employment application process:

> A master or other principal who is under a duty a duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty.[62]

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the employers retained power to oppose the union discrimination. As pointed out above, the employers were by contract entitled to a hiring hall operation which adhered to the terms provided. The contract required division of all applicants into experience-related classifications and referral in accordance with specified priorities. These matters were not beyond the potential ocntrol of the employers. Furthermore, a grievance procedure was established (for all relevant periods) by which complaints by applicants against the operation of the hiring hall could be made. This procedure would involve participation of an employer representative. Also, the bargaining agreement expressly provided since May, 1971, that referrals, the ultimate product of the hiring hall, not be made on a racially discriminatory basis. These indicia give far more by way of control than existed in *United States Steel, supra*, where not even express managerial resistance was effective to stop a master mechanic from choosing only union members as assistants and where that master mechanic was held to be an "agent" of the employer tying him to the illegal hiring. Agency principles establishing traditional bases for the spreading of risk and responsibility which the doctrine of *respondeat superior* seeks generally to accomplish, serve as an important guide in this case, just as they served to guide the court in *Morrison-Knudsen* and *United States Steel*.

[62] It should be noted also that *comment a to § 214, Restatement (Second) of Agency*, in defining liability for a breach of a nondelegable duty states:

> [O]ne may have a duty to see that due care is used in the protection of another, a duty which is not satisfied by using

The duty to see that discrimination does not take place in the selection of one's workforce must, as was clearly suggested in *Carey* and *Myers*, *supra*, remain with the employer if it is to have full meaning. Employers cannot be permitted, collectively or individually, to use the union as a shield and become oblivious to discriminatory practices whose true harm is revealed in the composition of their own employees. It is still the employer who contracts to hire individuals, even in a hiring hall setting, and that employer should not be free from all responsibility to take steps to alleviate discrimination when found simply because he may be blind to the racial composition of the pool from which workers are referred. Injuntive remedial relief should quite properly be available against such an employer or employers to eliminate discrimination when found.

The contention that each employer's workforce must be examined individually before even injunctive liability under § 1981 can be found misperceives the thrust of a *respondeat superior* theory of liability. It is the mass of employers collectively who by originally agreeing to or subsequently adopting the exclusive hiring hall provision, effectuated a *collective* delegation of the employment application process. Because of this delegation the intentional discrimination of the union was able to work its way broadly into the common workforce of operating engineers. Inasmuch as the delegation of the application procedure was meant to be industrywide within 542's jurisdiction, and is a product of all those employers agreeing to a single arrangement, those employers must together share responsibility, at least injunctively, for the discrimination by the union. Summarized simply, two elements are necessary to this conclusion and have here

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care to delegate its performance to another but is satisfied if, and only if, the person to whom the work of protection is delegated is careful in giving the protection.

Duties arising under § 1981, manifestly, are no more subject to being bargained away than were the Title VII duties in *Lorillard*.

been satisfied: (1) the employers delegated an important aspect of their hiring procedure to the union; (2) the union, in effectuating the delegation, intentionally discriminated or, alternatively, produced a discriminatory impact. The acts of the union therefore justify imposition of responsibility upon those employers participating in the original delegation.

Although plaintiffs have failed to show intent to discriminate by the employers as a class, and indeed have been unable to show knowledge or notice of discrimination by that class as a whole, plaintiffs have shown that the requisite relationship exists among employers, associations, and union to render applicable the theory of *respondeat superior*, thus making employers and associations liable injunctively for the discriminatory acts of the union.

This decision is not designed to carry with it, however, a presumption of backpay liability specifically against the employers themselves, for questions concerning possible allocation between the intentionally discriminatory union on the one hand and the employers and associations vicariously liable on the other must, by analogy to Title VII, and in the natural order of things, await consideration of the trial court at Stage II. Although the evidence necessary to make this evaluation quite properly has not been presented at Stage I, it has been conceded by plaintiffs at oral argument that among the class of defendant employers there are some whose operating engineer workforces are racially balanced and who might have had no reason to suspect that hiring hall discrimination was occurring or who might have taken steps to avoid discrimination. While these circumstances would not absolve such employers of appropriate injunctive liability for the effects of the hiring hall system, they are factors among other possible factors which may be considered at the damages stage along with the question of allocation. Plaintiffs themselves concede that no liability in backpay should be assessed at this stage inasmuch as that deter-

mination may depend on individual issues relating to the culpability *vel non* of particular members of defendants' class. Whether such determination can or cannot take place without decertification of the defendant class is an issue not now ripe for decision.

b. *Employers and Associations Potential Liability Under 1985(3)*

In the decision of the Third Circuit in *Bethel v. Jendoco Construction Co.*, 570 F.2d 1168, 1172-73 (3d Cir. 1978), the court in the context of an employment discrimination case outlined the elements of plaintiffs' proof under § 1985(3) as required, by *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971):

> To come within the purview of 42 U.S.C. § 1985 (3), [footnote omitted], Bethel's complaint was required to allege four matters:
>
> (1) a conspiracy;
>
> (2) for purposes of depriving another . . . of equal protection or equal privileges and immunities;
>
> (3) any act in furtherance of the conspiracy committed or caused to be committed by a conspirator;
>
> (4) whereby another . . . was injured in his or her person or property or deprived of a right or privilege as a United States citizen.

See also Novotny v. Great American Federal Savings and Loan Association, 584 F.2d 1235 (3d Cir. 1978). Although it is plain that the violations alleged here meet the invidious class-based standard articulated in *Breckenridge*, it nevertheless seems obvious that no per se or vicarious liability theory could be used to hold a class of employers liable for conspiracy to commit the discrimination practiced by the union. In fact, since the collective bargaining agreement was not itself discriminatory,

there was no sufficient proof that as a class the employers agreed to violate equal protection rights or equal privileges and immunities. The conclusion would be the same even if the broad rationale of *Dickerson v. United States Steel Corp.*, 439 F.Supp. 55 (E.D.Pa. 1977), were to be supplied. The court there stated that "a party who acquiesces in illegal behavior which could be regulated by contract, either by not pressing for change in the contract or not complaining about an apparent disregard of its provision, has impliedly entered into a conspiracy." *Id.* at 67. Not even acquiescence of the whole class of employers in the sense of a conscious toleration of the discrimination of the union has been shown. Absent such classwide proof, no § 1985(3) claim could be upheld even on this expansive theory. Furthermore, to the extent that individualized proof against particular employers may be necessary to establish a § 1985(3) claim, it is not appropriately raised against a class of defendant employers.

The liability of the associations under § 1985(3) raises a closer question because of their involvement in dramatically missstating the minority population of 542 in avoiding application of the Philadelphia Plan. Nevertheless, despite this reckless disregard for the accuracy of these figures and other proof of inaction, I do not on the present record find actual knowledge of the formal error in figures or of union discrimination generally.

C. *Appropriateness of the Defendant Class as to Section 1981 Claims*

Having determined that in this factual setting the scope of § 1981 permits per se or vicarious liability at least as to equitable relief on the part of all employers who delegated exclusively to 542 the role of employee-applicant selection, much of the basis for objection of defendant nonparties to the defendant class is dissipated, for there are no individualized issues which might be overlooked. It is nevertheless appropriate to consider in detail the applicability of Rule 23(a) and (b), the issue

of standing of the plaintiff class to assert claims broadly against the defendant class, and the issue of personal jurisdiction over the defendant class members.[63]

1. *Rule 23(a)*

First, the requirements of rule 23(a), considered above in discussing the composition of plaintiffs' class, must be analyzed with respect to the defendants' class. As has been pointed out, rule 23(a) contains four basic requirements: numerosity; commonality of questions of law or fact; typicality of claims and defenses; and the adequacy of the class representative to protect the class interests. While numerosity is not in question, the remaining requirements have been assailed; they are best discussed upon examination of the representative's adequacy and a recapitulation of the claims against the defendant class.[64]

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[63] Nonparties in January 1978 demanded a jury trial. This demand was made for four years after notice of this suit and months after the end of the lengthy year-and-one-half trial in this matter. Apart from the very serious question whether any nonparty member of a class, although permitted to bring its views to the attention of the court, can ever make such a demand without intervening under rule 24, *F.R.Civ.P.*, the jury trial demand here must be foreclosed as untimely under rule 38(d), *F.R.Civ.P.* The demand was precipitated by a letter from plaintiffs announcing that contrary to their prior expectation they would *not* move to amend their complaint. This circumstance does not alter my view.

[64] The basis for liability of the class of defendant associations and contractors is § 1981. The redefinition of defendant class to comport with the six-year statute of limitations is therefore appropriate.

(a) All employer associations who have been parties to a collective bargaining agreement with defendant Local 542 at any time between November 8, 1965, and the date of this decree; and

(b) All employers who have been parties to a collective bargaining agreement with Local 542 and who hired at least one operating engineer affiliated with Local 542 at any time between November 8, 1965, and the date of this decree.

Defendant Glasgow, Inc., is one of the largest employers of operating engineers in 542's jurisdiction. It is a member of the CAEP and is a party to the collective bargaining agreement providing for an exclusive hiring hall. It regularly receives referrals of operating engineers from 542's hiring hall. Also named as defendants are the trade associations which have as members employers of operating engineers in 542's geographical range. These associations are defendants not only because of the composition of their membership, but because of their administrative capacity as associations to serve as negotiators or spokesmen for their members. Both named associations and named defendant employer are represented by the same counsel, whose abilities to conduct this litigation cannot seriously be questioned.[65]

Focusing on defendant Glasgow's representative status, *Wetzel*, *supra*, requires us to consider whether Glasgow and other members of defendants' class are in antagonistic positions with respect to the subject of the claims against them. It must be concluded that they are not, although non-parties have asserted numerous arguments against such a conclusion. Nonparties have urged that it is in Glasgow's personal interest to keep as many employers in the suit as possible so as to dilute potential liability. As an indicium of this antagonism nonparties allege Glasgow's failure to oppose certification of the defendant class and to respond to a memorandum, requested of plaintiffs by the court, on the appropriateness of the defendant class certification. Nonparties have also argued that historical antagonism between national and local contractor-employers makes joining them under the representation of a local contractor and associations improper.

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[65] Only Glasgow itself need be considered in evaluating the adequacy of representation. The presence of four associations as named defendants reassures that a thorough representation was provided.

Named defendants did oppose the defendant class certification as proposed by plaintiffs at oral argument on February 18, 1972, though they did not reject the total concept of it. But more importantly if this court now otherwise accepts the proposed defendant class as proper under rule 23, having the additional benefit of all the objections of nonparties, the level of named defendants' opposition to defendant class certification seems virtually meaningless.

Concerning the theory that a named defendant would prefer to be sued as a member of a large group rather than alone and that such a preference defeats its adequacy of representation, not much need be said. Taken to its logical conclusion the theory could prevent every defendant class action. The real question is whether representation by a named defendant of a class of defendants would result in a less than full and aggressive representation. Defendant Glasgow had absolutely nothing to gain by defending the action poorly since that could create liability in itself, even if liability were broadly distributed. And so long as the terms by which liability would be imposed upon a named defendant employer are exactly the same as the terms upon which any other defendant employers might be held liable, there is sufficient assurance that the named defendant will represent absent defendant class members adequately. The elements of § 1981 which plaintiffs had to prove against the defendant class are elements which Glasgow and the associations had a definite interest in rebutting to avoid individual liability—union discrimination and the entrustment of employment application processes to the hiring hall by agreement with the union. As to these issues there can be no distinction between national and local contractors. Even if some employers among the class may have used C or D branch members whose referral was not regulated by the contract with the construction branches, that does not make them different with respect to the issues relating to construction branch

employment. There is thus no legal antagonism with respect to the only basis for defendant class liability.

Hand in hand with the lack of legal antagonism, and hence the adequacy of the named defendants, commonality and typicality requirements are fulfilled. As has been stated, the issues of fact and of law are precisely the same for all employers at this liability stage. With respect to the theory of per se liability adopted herein there is likewise no individualized defense. It is, to repeat, not now properly considered whether the representation or certification at the liability stage may continue into Stage II.

2. *Rule 23(b)*

Nonparties additionally attack defendant class certification on the ground that certification under 23(b)(2) or (b)(1) is improper in general terms and that (b)(3), which permits a class member to opt out after notice is the only permissible method of certification. Nothwithstanding these arguments, the defendant class does indeed fall within rule (b)(2).

Rule 23(b)(2) provides that a class may be certified where

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .

It would be somewhat incongruous if a class of plaintiffs must have "acted or refused to act" on grounds generally applicable to a class of defendants in order to validate the defendant class, for that would place the power of creating a defendant class into the hands of a possibly obstinate and unreasonable plaintiff. 3B J. Moore, Federal Practice ¶ 23.40 at p. 103 (Supp.1977-78). But where, according to the allegations and proof, a class of plaintiffs is forced, if they wish to be employed as op-

erating engineers, to act with respect to the defendant class of employers in one and only one way, the requirements of 23(b)(2) are met.

It must be remembered that rule 23(b)(2) or any part of rule 23 is not by its terms applicable only to a plaintiff class certification. Indeed, the language in 23(b)(2), "the party opposing the class," on its face clearly indicates that the section was deliberately cast to include defendant class action suits. Numerous cases have upheld 23(b)(2) defendant class certifications in a variety of contexts. *E.g., Redhail v. Zablocki*, 418 F.Supp. 1061, 1066 (E.D.Wisc.1976) (three judge court), *aff'd on other grounds*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978); *Thompson v. Board of Education of Romeo Community Schools*, 71 F.R.D. 398, 402 (W.D.Mich.1976); *Bradford Trust Co. v. Wright*, 70 F.R.D. 323 (E.D.N.Y.1976); *Paxman v. Wilkerson*, 390 F.Supp. 442, 447-48 (E.D.Va.1975); *Gibbs v. Titelman*, 369 F.Supp. 38, 52-53 (E.D.Pa.1973), *rev'd on other grounds*, 502 F.2d 1107 (3d Cir.), *cert. denied*, 419 U.S. 1039, 95 S.Ct. 526, 42 L.Ed.2d 316 (1974). *Washington v. Lee*, 263 F.Supp. 327, 330 (M.D.Ala.1966), *aff'd* 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968); *see* Note, *Defendant Class Actions*, 91 Harv.L.Rev. 630, 633 (1978). There are, however, cases which hold or suggest otherwise. *Mudd v. Busse*, 68 F.R.D. 522, 529 (N.D.Ind. 1975), *appeal dismissed*, 437 F.Supp. 505 (1977); *cf. United States v. T. I. M. E.-DC, Inc.*, 335 F.Supp. 246 (N.D.Tex.1971) (holding, alternatively, that where various union locals were sought to be joined as defendant class, court lacked *in personam* jurisdiction over them so long as alteration of contract was envisioned).

While among the cases permitting a (b)(2) defendant class certification *Redhail* and *Gibbs* were suits seeking to enjoin a class of state officials from enforcing a generally applicable state statute alleged to be unconstitutional, *Thompson* and *Paxman* were wider ranging suits seeking to enjoin, respectively, school boards and school

board members for policies alleged to discriminate on the basis of sex. *Thompson* upheld a 23(b)(2) defendant class consisting of "all school boards in the state of Michigan which . . . have treated or now treat pregnancy related disability differently than other temporary disabilities . . ." *Id.* at 402. Similarly, *Paxman* upheld a class of school board members whose districts applied discriminatory maternity leave policies, even though maternity policies could vary in their precise terms from district to district. *Paxman* and *Thompson* suggest a very practicable solution: if that which makes a practice illegal is common to the defendants, there can be no cognizable objection to the concept of a (b)(2) defendant class certification. Where, of course, issues are not identical or closely parallel, there would be a serious argument against binding an absent defendant under *res judicata* principles to the result of a litigation in which he did not participate and of which he was not entitled to notice. Such a circumstance, not presented here, might cause some reluctance to apply what appear to be the plain terms of 23(b)(2), perhaps on the theory that congressional intent could not be found to support the result. But where the litigable issues are identical or nearly so, the efficacy of proceeding by a defendant class action logically outweighs the arguments favoring multiple individual suits and fits tightly with the overall scheme of 23(b)(2). Where such identity occurs there is no greater reason to deny classwide *res judicata* application against defendants than against plaintiffs.

The importance of (b)(2) certification in a case such as this is heightened because of the impossibility of obtaining make-whole injunctive relief from employment discrimination against any particular defendant. The hiring hall system is a method of distributing the labor resource throughout relatively large areas in which various contractors may be intermittently engaged. As a practical matter, given the allegations in this case, if plaintiffs' class (or an individual plaintiff for that mat-

ter) were limited to suing individual defendant employers there could be no assurance that a mandatory remedial level of hours and wages could ever result, or that strict adherence to the rules of the hiring hall would be broadly maintained by employers, or that employers as a whole could be obliged to take steps to assure an awareness of the levels of minority employment in 542's jurisdiction. Each of these matters concerns relief which may be necessary to each discriminatee, for operating engineers in a hiring hall setting cannot regulate or foresee those employers to whom they may be referred.

3. *Standing*

The question remains, however, whether named plaintiffs have standing to sue a class of defendants whose members include employers by whom no named defendant was employed as well as employers operating outside District I, the place of residence of all named plaintiffs. This issue is appropriately raised in a discussion of the scope of defendants' class because a lack of standing by named plaintiffs would affect defendant class certification.

Nonparties rely heavily upon two decisions, *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973) and *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 694-701 (E.D.Pa. 1973), which, they assert, instruct that a decertification must here be ordered. Neither case, however, is decisive of the issues now raised.

La Mar was a consolidation of two actions. One was a suit by a plaintiff class represented by a single named plaintiff, La Mar, against a defendant class of pawnbrokers. The other was a suit, again by a single named plaintiff, Kingsling, on behalf of a class of plaintiffs against eight airline companies. Both cases involved alleged overcharges of nominal amounts stemming from practices common to the respective groups of defendants. La Mar alleged personal injury from only one pawn-

broker and Kingsling alleged injury from only two air carriers. Although *declining* to decide that the named plaintiff in each action lacked standing to sue those defendants who caused him no injury, the court made use of a standing rationale in determining that the named plaintiffs lacked the requisite typicality, stating that "the representative plaintiff's cause of action is against a defendant unrelated to the defendants against whom the cause of action of the members of the class lies." *Id.* at 465.

Even accepting the rationale of *La Mar* on the standing issue, it still appears that *La Mar* is inapplicable in the present setting. The court specifically distinguished, for instance, the case of *Washington v. Lee*, 263 F.Supp. 327 (M.D.Ala.1966), in which two black prisoners, alleging segregation, were permitted to sue a defendant class of *all* sheriff's and wardens of city and town jails in Alabama, even though the named plaintiffs were not themselves alleging injury by all such sheriffs and wardens. The *La Mar* court was persuaded that

> Aside from the somewhat broad and accommodating concept of standing in civil rights cases, [footnote omitted] it is also true that the defendants were officials of a single state and its subordinate units of government. Their legal relationship distinguishes them from the defendants the plaintiffs La Mar and Kingsling seek to envelop in their class action. [*Id.* at 469-70]

The court later registered its belief that mere common commercial practice does not constitute a sufficient "legal relationship." It is thus fair to conclude that the *La Mar* result was not intended to reach civil rights cases and especially not civil rights cases in which the members of a proposed defendant class were engaged in a joint, not merely comparative, undetaking such as sharing the hiring hall services of a single local union under the same terms and conditions. This distinction may be particu-

larly significant where more than nominal relief is sought.

Weiner v. Bank of King of Prussia, a case decided squarely on Article III standing grounds, held that a single plaintiff having dealings with a single bank cannot assert a National Bank Act or Truth in Lending Act claim against all banks in the court's jurisdiction alleging failure to properly disclose interest rates. It is important to understand that in this commercial suit the group of defendant banks had no legal relationship whatsoever (contractual or otherwise) to one another. *Weiner* therefore does not resolve the questions presented here.

The Third Circuit's decision in *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727 (3d Cir. 1970) (Aldisert, J.), served as the stated basis for the *Weiner* decision and was also quoted in support of the Ninth Circuit's *La Mar* decision. *Kauffman*, like *Weiner*, was a standing case in which a plaintiff holding shares in four mutual funds was held, *inter alia*, to lack standing to sue 61 other mutual funds for like practices in a derivative-type action alleging securities violations and illegal anti-trust conspiracy to fix fees and to monopolize. Inasmuch as the derivative action as defined in rule 23.1 requires that one who is not a shareholder in a corporation cannot bring a derivative action in its behalf, *Kauffman's* holding is very narrow indeed. The court tellingly observed that:

> A secondary right is limited; it is co-existensive with plaintiff's need as a shareholder to protect an interest which allegedly has been impaired. And the very limitation that inheres conceptually in a derivative action is the bar which defeats appellee's attempt to qualify as the class representative for the other funds. [434 F.2d 737]

The court did not rule out the possibility that, had the plaintiff's right against the four funds of which he was

a shareholder been primary, he could properly have sued the other 61 mutual funds.

> To be sure, if the fund itself sought to bring a class action in behalf of other funds similarly situated, there would be no theoretical barrier prohibiting such a class action. [*Id.*]

Weiner's stated explanation for this distinction in *Kauffman* is the existence in *Kauffman* of an antitrust conspiracy count, but the Court of Appeals did not so limit its language. *Kauffman* certainly does not rule out the availability of the defendant class device where named plaintiffs have a true direct claim or cause of action against at least one of those defendants and all issues are common. *See La Mar, supra* at 468-69.

Even if *La Mar* and *Weiner* were viewed as correct statements of the standing doctrine in class actions, and this need not here be addressed the present action would not be materially affected. There is in this case a single entity, Local 542, which was alleged and proved to have undertaken a pattern and practice of intentional discrimination (and to have acted in such a way as to have caused a substantial discriminatory impact). The named plaintiffs clearly have standing to sue Local 542 even though they are all residents of District I. The five district divisions in 542 are, moreover, directly related to each other and administratively under the direction of one Business Manager. In same cases job assignments may be obtained interdistrict, and the same collective bargaining agreement applies in all districts, though each maintains its own out-of-work hall listings.

The two asserted standing defects, to repeat, arise from (1) the failure of named plaintiffs to show that they made direct applications to or had direct dealings with *all* the defendant employers and (2) the representative plaintiffs' common residence in District I. It must be reiterated that the governing entity of 542 consists of a single executive board comprised of 542 officers and

elected representatives from each district. Further, because of the nature of 542's hiring hall system any given minority listee is in a pool of applicants to all and any employers who may request a referral in one of the five districts.

Employers using this hiring hall system rely on a constant presence of some available workers in five convenient geographical areas, being aware also that the exact composition of those workers is changing constantly as referrals are made and as individual jobs are completed. It is precisely because of this method, supplanting the direct application process, that employers may be said to have had dealings with the members of the plaintiffs' class and its representatives even though no plaintiff may have applied to any employer directly and even if only a small number had actually been employed.

In one sense, of course, plaintiffs might have been able to limit their proof to discrimination in District I or to discrimination personally against themselves, avoiding a class action suit altogether. But Title VII permits suit against the labor organization alleged to be the source of employment discrimination, not just a piece of it. Indeed, Title VII by its very nature, envisions class action litigation. In this light, while named plaintiffs might have acted otherwise, they had standing to sue 542 as a whole on a class action basis. The only cognizable claim which plaintiffs have against the class of defendants results from the denial of equal employment rights through the hiring hall system which, to the extent articulated above, was the responsibility of *all* class defendants. Named plaintiffs do therefore have a personal stake in the case against all defendants. *See Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). It follows that those employers dealing with the exclusive hiring hall system are rightly joined in this action as parties accountable for 542's Title VII or 1981 violation, even if the suit against the employers is based on 1981

alone. *La Mar*, *Weiner*, and *Kauffman* certainly are not authority for a contrary conclusion on these facts.

Also, as the *La Mar* court observed, in civil rights cases plaintiffs' standing is to be interpreted as expansively as Article III permits. *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3d Cir. 1971), states:

> The national public policy reflected both in Title VII of the Civil Rights Act of 1964 and in § 1981 may not be frustrated by the development of overly technical judicial doctrines of standing or election of remedies. If the plaintiff is sufficiently aggrieved so that he claims enough injury in fact to present a genuine case or controversy in the Article III sense, then he should have standing to sue in his own right and as a class representative. [*Id.* at 446-47]

There are sufficient, if unique, connections among defendant employers, the union, and the named plaintiffs so that named plaintiffs' standing to sue the defendant class on behalf of all plaintiffs on a vicarious liability theory must be upheld. Named plaintiffs have a claim against all defendants and hence have a stake in the outcome of the litigation sufficient to assure concrete adverseness and at the same time afford to rule 23 a scope commensurate with its purpose.

4. Personal Jurisdiction Over the Defendant Class

The question of personal jurisdiction over members of the defendant class is quite separate in theory from the Article III standing objections discussed herein. The argument raised by nonparties is essentially that due process considerations protect unnamed defendants from liability, particularly monetary liability. However, as the Supreme Court stated in *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed 22 (1940):

> members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present. . . . [*Id.* at 42-43, 61 S.Ct. at 118-119]

In this case the class of defendants was adequately represented. Particularly because the only basis for liability of the defendant class was vicarious liability under § 1981 and because only injunctive liability has been decided at this stage, there is no room for argument that the named defendant Glasgow, Inc., was unrepresentative. I must also reiterate that notice was provided to the unnamed members of the defendant class by certified mail two years prior to the trial in this case. In these circumstances and given full compliance with rule 23 there seems little doubt that through the defendant class device personal jurisdiction over the defendant class was achieved.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 71-2698

COMMONWEALTH OF PENNSYLVANIA *et al.*

v.

LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS *et al.*

Nov. 7, 1979

As Amended April 25, 1980

OPINION

A. LEON HIGGINBOTHAM, Jr., Circuit Judge.*

I.

The Impoundment and Settlement Process

Today I file an opinion which supplements and explains a decree filed on August 8, 1979. By agreement of all parties, the August decree was impounded when filed; no one other than my staff and I saw it or was aware of its contents. The decree will be released from impoundment upon the filing of this opinion. Since the impoundment process, which I also invoked for the November 30, 1978 liability opinion, is somewhat unique, a description of the events and an explanation is appropriate.

The impoundment was in the best interests of the parties and the public as it maximized the chances for settlement. All parties desired to have the court move forward with the resolution of pending legal issues, while they simultaneously explored settlement options on their own. Litigants settle cases because neither party knows for sure what the ultimate outcome of the litigation will be.

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* United States Circuit Judge sitting by designation.

In a sense, it is almost like a shell and pea game; when your shell is picked up, will you be a big winner or a disappointed loser, and what will the ultimate amount of damages be, if any?

The litigants were sensitive to the realities of the settlement process; they recognized that a premature revelation of the trial judge's ultimate views could cause the "winning" party to harden his position and thereafter be less receptive to a compromise. Such inflexibility at the bargaining table would decrease the probability of any settlement and add years to a case which has been litigated for several years already. The parties at one point asked me to assist them in the settlement process. While I was supportive of any bona fide settlement efforts of the parties, I did not want to be privy to any confidential settlement discussions while I was adjudicating issues of liability or formulating the contents of the formal decree; hence, the necessity for the impoundment process.

There were at least two substantial efforts to settle the case. The first major attempt occurred during the summer of 1978 after there had been an election of different officers for the union and a change of counsel for the union. At that time the record had already been closed; proposed findings of fact and briefs had been filed; and the matter had been argued. The case had been bifurcated earlier and had been tried on the liability issues only. At some point in 1978, though from my view far too belatedly, the parties seemed to acknowledge that even if the plaintiffs received a favorable liability decree, the battle would be far from won because the scope of the decree and the amount of damages could be subjects of further litigation which could protract this matter for additional years. If the issue of liability was resolved against all the defendants or any single defendant, further extensive litigation would follow on what injunctive relief would be appropriate, how jobs would be allocated, and how damages would be calculated on an

individual basis. The decision on whether any specific person is entitled to monetary damages cannot be resolved at the liability stage. We were and still are dealing with a complicated matrix which involves thousands of union members and hundreds of thousands of man hours extending over more than a decade of work experience. The fact finder must ultimately review the work pattern and hours of each specific plaintiff (a named plaintiff or a member of the class) and compare his past record with what he would have gotten absent discrimination.

While I was anxious to have the case settled if the parties could agree, I did not want the settlement process to impinge on the judicial fact-finding aspects or to deter unduly my ultimate decision on the liability phase. Thus, it was agreed that I would finish my opinion as planned, and I would file and impound it; if the parties did not agree on a settlement, it would then be released from impoundment. The liability opinion was filed on November 30, 1978. In late December, 1978, I was advised that the parties could not settle the case, and accordingly my liability opinion was released from impoundment on January 2, 1979. *Commonwealth of Pennsylvania v. Local Union 542*, 469 F.Supp. 329 (E.D.Pa.1978). That opinion dealt with the factual and procedural background of this litigation's liability phase. The parties were obligated to file proposed forms of decree consistent with the opinion.

In 1979 after the oral argument on the form and substance of the decree, another substantial effort was again made by the parties to settle the case. This time the parties asked me to participate in the settlement process in the hope that, with my knowledge of the record, I could make a recommendation that would be acceptable to all parties. So that my participation in settlement discussions would not infringe on the adjudicatory aspects of the case, I filed the decree on August 8, 1979 and only thereafter participated in several settlement conferences with the parties. Thus, the parties could discuss can-

didly their settlement views without fear of affecting my ultimate decision on the legal issues or on the form of the decree.

Tragically, the parties were once again unable to settle the case even though I made specific recommendations on dollar amounts and injunctive relief. One side was willing to accept my recommendation but the other side made, in my view, such an unrealistic demand that the class plaintiffs' cupboard will again be barren—except for the gratification that their counsel will be arguing refined, sophisticated legal doctrines about damages which they hope to collect years from now.

Some comment is also required on the influence of class certification on the settlement process. When this suit was filed, all twelve of the named plaintiffs were graduates of the Benjamin Franklin I or II program. At that time none, or at most one, of the named plaintiffs was a member of the union. In my opinion of November 30, 1978, when dealing with the issue of class certification, I noted:

> I find that there is no conflict between such plaintiffs for purposes of trying the *legal* issues of this suit. Plantiffs are not attacking the hiring hall system as constituted but rather are attacking practices which, while forming no part of the hiring hall's stated foundation nevertheless have a profound impact on its operation.

469 F. Supp. at 350 (emphasis supplied).

This previous certification of the class pursuant to Federal Rule of Civil Procedure 23 was for the liability phase of the case only. Since this case has not been settled, and it will proceed to the damage phase, I leave it for the judge who will try this case on the damage phase to ascertain whether the named plaintiffs—or the advisory committee of 15 to the plaintiffs' counsel—now satisfy the standards for class representation pursuant to Rule 23. For the purposes of settling or trying the damage issues of this suit, I would today reconsider the issue of whether

the named plaintiffs are "representative parties [who] fairly and adequately protect the interest of the class" as required by Federal Rule of Civil Procedure 23(a)(4). In fact, it is difficult for me to ascertain what role the named plaintiffs are now exerting in this case. Apparently instead of the named plaintiffs being the decisive ones making the decisions for settlement, that responsibility has been allocated to an advisory committee of fifteen, appointed by plaintiffs' counsel, to consult with plaintiffs' counsel and make decisions on settlement and damages for the entire class. On that committee, nine of the fifteen are parent body journeymen members of the union and thus are skilled operating engineers. Only two of the named plaintiffs are members of the advisory committee. Thus, for settlement purposes we had the anomaly that 87 percent of the advisory committee consisted of persons who did not file the suit. I am not certain that as a group the advisory committee's interests will be precisely the same, when it comes to settlement or damages, as those individuals who still seek for the first time entry into an apparenticeship program or membership in the union. I am not certain whether the parent body journeymen's desires to be compensated for financial damages purportedly suffered in the past will get higher priority in the settlement process than the opening of new jobs to people who have yet to get a union card. By these comments I am not impugning the members of the advisory committee. Many have testified before me and, with compassion, have revealed dreadful stories of years of humiliation, scorn and disparate treatment. But the settlement process requires a balancing of the interest of all members of the class and a settlement necessarily means that no one gets in full today what he hopes he might get by verdict a decade from now.

Similarly, these comments are not intended to impugn in any way plaintiffs' counsel, for I note on the record the court's high respect for the perceptiveness, dedication, and unlimited tenacity of plaintiffs' counsel. However,

at the damage phase, all counsel must come to grips with the reality that it is often easier to litigate acrimoniously and protractedly than it is to use creative efforts in attempts to constructively terminate litigation. In the final analysis, the brilliant briefs of counsel, the flash of eloquent arguments, the citations in the future to their case as significant precedent, and even the drama of a packed courtroom will never be adequate mementos for the victims of discrimination who desire money and jobs *now*. Similarly, protracted litigation does not aid the defendants who at this stage must recognize that it is far better to conclude litigation with liability and responsibilities being defined now, than to wallow endlessly in a quagmire of unresolved disputes—as lawyers are kept busy litigating, and operating engineers and their employers are kept confused by the unending process.

II. *The Scope of the Decree*

This section is intended to elucidate the purpose and bases of the August 8, 1979 decree in order to clarify these points for the parties and to facilitate meaningful appellate review. The factual and procedural background of this litigation is set forth in detail in my opinion on liability filed and impounded on November 30, 1978 and released from impoundment on January 2, 1979. In that opinion, I found that plaintiffs had proven that Local Union 542 had engaged in intentional discrimination in violation of Title VII and 42 U.S.C. Section 1981.[1] I also found that the named defendants and the defendant class were liable at least injunctively for such discrimination. No award of injunctive relief was made at the time that opinion was filed.

Since that time, the parties have submitted proposed forms of injunctive decrees, with supporting memoranda,

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[1] Violations of Title VI, of 42 U.S.C. § 1985(3) and of 29 U.S.C. § 158 were also alleged. I found that plaintiffs had proven both discriminatory impact and discriminatory purpose. The former finding alone is an independent basis both for the finding of the violations and the imposition of this decree.

and replies to the decrees proposed by the other parties. Extensive oral argument on those decrees was heard. The injunctive decree entered August 8, 1979, although borrowing in part from the proposed decrees, does not adopt any of those decrees in full.

Although it would not be practical or profitable to summarize all the provisions of the decree, the basic operative mechanisms can be briefly described. The major objectives of the decree are that the percentage of minorities in Local 542, the percentage of referrals they receive, and the percentage of hours they work all equal the percentage of minorities in the relevant communities. In other words, my primary concern is to remedy discrimination in entry, referral and hours.

With respect to entry, the main feature of the decree is the requirement that, for the first two years, one minority be admitted for each non-minority that is admitted until the percentage of minority members in a given district equals the percentage of minorities in the community in that district. For the third through fifth year, one minority must be admitted for each two non-minorities admitted. Other provisions of the decree designed to remedy entry discrimination require the validation of entry criteria and a one for one minority to non-minority ratio of admission into the Joint Apprenticeship Training Program.

The referral and hours problems are closely inter-connected. The decree sets goals for the percentage of hours worked by minorities for each year in each district. These goals increase until, by the fourth year of the decree, they equal the percentage of minorities in the relevant district's population. Referrals must also be made in accordance with these percentages. Employers whose minority hours do not meet these goals must request additional minoritity referrals and, if a sufficient number are not available from the hiring hall, employers must directly hire qualified minority operating engineers. Should the number of qualified minorities available

through referral and direct hire be insufficient, the employers are under an obligation to train unskilled minorities. Also, since in many cases the amount of hours an operating engineer can work is dependent on the level of his skills, the decree requires that the defendants provide a retraining and upgrading program to improve the skills of minority operating engineers.

The direct oversight of the decree will be entrusted to a United States Magistrate who will be assisted by an Advisory Committee selected primarily by the parties. The parties will make quarterly statistical reports to the Magistrate. The requirements for entry, referral and hours are all subject to adjustment on the basis of these reports. I have deemed it essential that flexibility be maintained so that seemingly reasonable requirements that subsequently turn out to be too lenient or too onerous may be modified in the light of experience.

My starting point in formulating the decree was the following statement of the purpose and proper scope of a remedy for unlawful discrimination:

> The relief is intended to restore those wronged to their rightful economic status absent the effects of the unlawful discrimination. *Robinson v. Lorillard Corp.*, 444 F.2d 791 (C.A. 4), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971). We are under a duty to render relief which will eliminate the "discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154, 85 S.Ct. 817 822, 13 L.Ed.2d 709 (1965); see *Smith v. Young Men's Christian Association*, 462 F.2d 634 (C.A. 5, 1972).

Rosen v. Public Service Electric and Gas Co., 477 F.2d 90, 96 (3d Cir. 1973).[2]

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[2] Although specifically written with respect to remedies under Title VII, this statement is also applicable to remedies for discrimination in violation of sections 1981 and 1985(3).

In order to accomplish this end, I have found it unquestionably necessary to require the imposition of certain quotas to govern entry into the union, referrals to actual jobs, and hours worked. There is simply no other way, given the circumstances of this case, to effectively remedy the discrimination found here. All of the parties, in their proposed injunctive decrees and responses to the proposals of other parties, have acknowledged as much since all have included some type of quota remedy. It is well established that quotas are a permissible part of a remedial decree. *See E. E. O. C. v. American Telephone & Telegraph Co.*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915, 98 S.Ct. 3145, 57 L.Ed.2d 1161 (1978); *United States v. International Union of Elevator Constructors*, 538 F.2d 1012 (3d Cir. 1976); *Erie Human Relations Commission v. Tullio*, 493 F.2d 371 (3d Cir. 1974). *See also United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979) (voluntary affirmative action remedies are permissible even without a finding of actual illegal discrimination by the particular employer.) The proper imposition of quotas as a remedy for past discrimination violates neither statute. *E. E. O. C. v. A. T. & T.* (quota remedies do not violate Title VII remedial provision, 42 U.S.C. § 2000e-5(g)), nor the Constitution, *United States v. International Union of Elevator Constructors*, 538 F.2d at 1018; *Erie Human Relations Commission v. Tullio*, 493 F.2d at 375, n. 7. Nor is such a remedy improper because it provides relief to members of a class who have not been individually shown to be the victims of past discrimination. *E. E. O. C. v. A. T. & T.*, 556 F.2d at 174-75.

The case law does reveal certain pitfalls that must be avoided by courts ordering this type of relief To the extent that such relief is predicated on statistical disparities, it must be found, on the basis of proper statistical analysis, that the disparities are the result of discrimination. *See Commonwealth of Pennsylvania v. O'Neill*, 473 F.2d 1029 (3d Cir. 1973) (in banc) (per curiam). As stated in my opinion on liability, I relied on both statisti-

cal and non-statistical evidence in concluding that unlawful discrimination had occurred. I examined in detail the statistical evidence revealing gross disparities between the percentage of minorities in the community and in the labor pool and the percentage of minorities in the union and the percentage of hours worked by minority operating engineers. I analyzed the testimony of defendants' experts who attempted to show that the statistics were not significant and that the disparities were caused by something other than racial discrimination. I ultimately credited the testimony of plaintiffs' expert and found that the statistical disparities were significant, and in conjunction with the other evidence, proved overwhelmingly that unlawful discrimination had occurred. In other words, were it not for the unlawful discrimination, no such disparities would exist.

In formulating the goals for minority membership in the union and for the hours worked by minority operating engineers, I have used the percentage of minority males between the ages of 18 and 65 in each district. I note that this is a conservative estimate. The actual percentage of minorities in the labor pool is probably higher. *See* 469 F.Supp. at 351. Thus, I have made here the type of factual findings with respect to the available work force that the court in *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 402 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041, 97 S.Ct. 741, 50 L.Ed.2d 753 (1977), considered "vital" and lacking in that case. Moreover, this decree requires no "across-the-board" quotas. *Id.* For example, I have refused to adopt plaintiffs' proposal that quotas be set for the hiring of shop stewards and business agents. Also, the percentage requirements for hiring master mechanics and assistant master mechanics are lower in District I, where the concentration of minorities is highest than those required for general entry or referral purposes.[3] Finally, the decree is not open-ended with

[3] Although I made no specific findings in my opinion on liability with respect to discrimination in the hiring of master mechanics

respect to duration. *Id.* The decree will expire in five years unless good cause is shown either for its extension or earlier termination.

Although providing a remedy for the victims of discrimination is, of course, the purpose of the decree, I recognize also that, in formulating each specific provision of that decree, I must consider the legitimate interests of the non-minority workers who may be affected by the decree, as well as the interests of their employers. *See, e.g., Carter v. Gallagher*, 452 F.2d 315, 330-31 (8th Cir.) (in banc), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972). Thus, under the decree, rarely, if ever, will non-minority employees be "bumped" from jobs they already have. Also, hiring requirements will be phased in so as to avoid undue disruption to employers and non-minority operating engineers.

In sum, this decree is entered with the hope and intention of providing as complete an injunctive remedy as is possible for the victims of past discrimination while not impinging unnecessarily upon the rights of others and while maintaining a significant degree of flexibility so that the requirements of the decree may be adjusted to best vindicate the rights of all involved.

III.

Despite my responsibilities for the last two years as a circuit judge, I have nevertheless continued my assignment on this case by special designation by the Chief Judge of the United States Court of Appeals for the Third Circuit. I willingly accepted this assignment because of my hope that I could aid in its amicable resolution and because of my desire that even if the case was

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and assistant master mechanics, the evidence presented at trial of pervasive discrimination limiting access by minorities to union entry, referral and skill development necessarily had the result of limiting minority access to the prestigious and high-paying jobs of master mechanic and assistant master mechanic. To the extent necessary, this may be considered an amendment of my earlier findings of fact and conclusions of law.

not settled it could go to another judge who would not have to resolve the complex and intricate liability and decree issues which have been presented to me over a period of years. The case is now in the posture where it can be efficiently reassigned with minimum difficulty since all of the liability issues and the decree issues have been decided. I will therefore ask Chief Judge Lord to reassign this case to a district judge for resolution of the damage phase. I am willing to consider any request by the parties that I decide the issues of counsel fees on the liability phase of this case.[4]

As I close my responsibilities on this case, I extend my best wishes to all of the parties. I trust that in the future they can be as effective in settling this case as they have been vigorous in litigating it.[5]

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[4] Since I am not certain as to whether paragraphs 23 and 24 of the decree adequately protect the rights of the minority graduates of Benjamin Franklin I and II, I will consider amending those portions of the decree if plaintiffs demonstrate by the factual presentation of *actual* cases that the decree does not provide adequate relief for those Benjamin Franklin graduates who are willing to work *now* or are willing to participate in retraining programs.

[5] For other phases of this litigation see *Commonwealth of Pa. v. Local 542*, 347 F.Supp. 268 (E.D.Pa. 1972), *aff'd*, Docket No. 72-1901 (3d Cir. May 21, 1973); *Commonwealth of Pa. v. Local 542*, 388 F.Supp. 155 (E.D.Pa. 1974), Docket No. 74-2281 (3d Cir. Dec. 30, 1974) (denying petition for writ of mandamus); Order (3d Cir. Feb. 25, 1975) (denying petition for stay pending application for certiorari), *cert. denied*, Docket No. 74-1272 (U.S. June 9, 1975); *Commonwealth of Pa. v. Local 542*, Docket No. 74-1772 (3d Cir. July 27, 1975) (order denying petition for writ of mandamus and for writ of prohibition), *cert. denied*, Docket No. 74-1557 (U.S. July 27, 1975); *Commonwealth of Pa. v. Local 542*, Docket No. 76-1290 (3d Cir. March 10, 1976) (order denying motion for stay); Order, (3d Cir. March 12, 1976) (order denying writ of mandamus); *Commonwealth of Pa. v. Local 542*, Docket No. 76-1331 (3d Cir. March 17, 1976) (order denying supplemental petition for writ of mandamus and the supplemental petition for stay); *Commonwealth of Pa. v. Local 542*, 73 F.R.D. 544 and 551 (E.D. Pa. 1976), *aff'd*, 552 F.2d 498 (3d Cir.), *cert. denied sub nom., Freedman v. Higginbotham*, 434 U.S. 822, 98 S.Ct. 67, 54 L.Ed.2d 79 (1977).

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 71-2698

COMMONWEALTH OF PENNSYLVANIA *et al.*

v.

LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS *et al.*

Dec. 23, 1980

MEMORANDUM OPINION

BECHTLE, District Judge.

On May 29, 1980, this Court entered Post Decree Order No. 10, in which various costs directly related to the injunctive aspects of this litigation were assessed against certain named party defendants in specified percentage allocations. This Memorandum Opinion sets forth further reasoning and authority for the issuance of that Order.

The action presently before this Court is an employment discrimination suit alleging a pattern and practice of racial discrimination. Suit was instituted in 1971 by twelve black plaintiffs on behalf of a class of minority workers who were either involved in or desired admittance to the trade of operating engineers throughout Eastern Pennsylvania and Delaware. The suit was brought against Local 542 of the International Union of Operating Engineers ("Local"); the Joint Apprenticeship Program ("JATC"); a class represented by Glasgow, Inc. ("Glasgow"), which consisted of over approximately 1400 unnamed contractor-employers who received referrals through the Local 542 exclusive hiring hall system; and, four construction trade associations which had

represented contractors in contract negotiations with Local 542.[1]

In March, 1972, the Court granted plaintiffs' motion for certification of both plaintiff- and defendant-classes, pursuant to Fed.R.Civ.P. 23(b)(2). The plaintiff-class consisted of:

(a) all minority group members who currently have the skills, when measured by objective standards, of at least a journeyman operating engineer and who work, or may work, within the territorial jurisdiction of defendant Local 542;

(b) all minority group members who are partially skilled, when measured by objective standards, to perform operating engineers work and who work, or may work, within the territorial jurisdiction;

(c) all unskilled minority group members who wish, or may wish, to acquire skills in the operating engineers trade and who are physically capable of acquiring such skills and performing operating engineers work within the territorial jurisdiction of defendant Local 542.

The defendant-class consisted of:

(a) all contractor associations which are, or may be, parties to a collective bargaining agreement with Local 542, International Union of Operating Engineers; and

(b) all contractor-employers who are subject to collective bargaining agreements with Local 542, International Union of Operating Engineers, and who, pursuant to such agreements, employ or will

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[1] Those trade associations are: Contractors Association of Eastern Pennsylvania ("CAEP"), Pennsylvania Excavating Contractors Association ("PECA"), General Building Contractors Association, Inc. ("GBCA"), and United Contractors Association ("UCA"). The PECA was dissolved in 1972.

employ operating engineers referred to them by defendant Local 542.

After considerable legal turbulence,[2] the trial to determine the issue of liability[3] commenced in January, 1976, and ended in June, 1977, during which lengthy testimony along with complex statistical evidence was presented by both sides.

Ultimately, on January 2, 1979, after a period of impoundment, the Court released its liability opinion, 469 F.Supp. 329 (E.D. Pa. 1978), in which the Court held that Local 542 and the JATC had engaged in intentional discrimination in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. §§ 1981, 1985(3) on the theories of discriminatory impact and discriminatory purpose. The Court also held that, under the theory of vicarious responsibility, the class of defendant contractor-employers and the contractor associations were injunctively liable under § 1981 for the discriminatory actions of the Local

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[2] *See Commonwealth of Pa. v. Local 542*, 347 F.Supp. 268 (E.D. Pa. 1972), *aff'd*, No. 72-1901 (3d Cir. May 21, 1973); *Commonwealth of Pa. v. Local 542*, 388 F.Supp. 155 (E.D.Pa. 1974), No. 74-2281 (3d Cir. Dec. 30, 1974) (denying petition for writ of mandamus); Order (3d Cir. Feb. 25, 1975) (denying petition for stay pending application for certiorari), *cert. denied*, 421 U.S. 999, 95 S.Ct. 2395, 44 L.Ed.2d 665 (1975); *Commonwealth of Pa. v. Local 542*, No. 74-1772 (3d Cir. July 27, 1975) (order denying petition for writ of mandamus and for writ of prohibition), *cert. denied*, 420 U.S. 908, 95 S.Ct. 826, 42 L.Ed.2d 837 (1975); *Commonwealth of Pa. v. Local 542*, No. 76-1290 (3d Cir. March 10, 1976) (order denying writ of mandamus); *Commonwealth of Pa. v. Local 542*, No. 76-1331 (3d Cir. March 17, 1976) (order denying supplemental petition for writ of mandamus and the supplemental petition for stay); *Commonwealth of Pa. v. Local 542*, 73 F.R.D. 544 and 551 (E.D.Pa. 1976), *aff'd*, 552 F.2d 498 (3d Cir.), *cert. denied sub nom., Freedman v. Higginbotham*, 434 U.S. 822, 98 S.Ct. 67, 54 L.Ed.2d 79 (1977).

[3] This case was bifurcated by Judge Higginbotham into a liability stage ("Stage I") and a damage stage ("Stage II"). Stage II of this litigation has not yet commenced.

and the JATC. The Court made no determination as to the issue of damages based on individual liability, if any, of any of the defendants, instead reserving that difficult determination for Stage II of the litigation.

Finally, on November 7, 1979, the Court released from impoundment its final Judgment and Decree granting the plaintiff-class specific injunctive relief, including integration into the operating engineers workforce through the use of hour and wage percentage goals, training, upgrading and other forms of relief.[4] Included were specified legal obligations of the defendants in order to effectuate those injunctive goals over a five-year period. Underlying those various forms of injunctive relief were a variety of costs which were to be borne by "the defendants." *See* Judgment and Decree at ¶¶ 1, 24, 42, 46.

It is this difficult but necessary allocation of those costs which are directly related to the injunctive aspects of this litigation that formed the subject of Post Decree Order #10[5] and this Opinion.

Five major questions confront the Court on the issue of taxing and allocating costs under the Judgment and Decree. They are: (1) what types of costs are directly related to the injunctive aspects of this litigation; (2) what parties should pay those costs; (3) in what percentage share should such costs be borne by each party; (4) when

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[4] This action was transferred to the present Court by Order dated December 6, 1979, from Judge Higginbotham due to his elevation to the United States Court of Appeals for the Third Circuit.

[5] In Post Decree Order #10, the Court ordered the following percentage allocations of injunctive-related costs against the six named defendants: Local 542—40%; JATC—25%; CAEP—10%; UCA—10%; GBCA—10%; and Glasgow, Inc.—10%.

To date, the following total sums have been paid by the following parties for costs found by the Court to be directly related to the injunctive aspects of this action: Local 542—$36,056; JATC—$22,534; CAEP—$9,013; UCA—$9,013; GBCA—$9,013; and, Glasgow, Inc.—$4,506 (Total paid: $90,135). *See* Post Decree Orders 13, 14, 17 and 18.

should those costs be paid by those parties; and, (5) should specific costs be assessed against specific individual parties?

I. *Types of Costs*

The Judgment and Decree addresses several features of injunctive relief which naturally and necessarily warrant the creation and imposition of various costs. Those costs include: (1) the cost of the preparation and mailing of notices of the Judgment and Decree to plaintiff-class members (¶ 46); (2) the cost of the preparation and mailing of notices of the Judgment and Decree to defendant-class members (¶ 46); (3) costs incurred by the Master, including his fees, expenses and costs;[6] and, (4)

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[6] Judge Higginbotham, in his August 8, 1979, Judgment and Decree, ordered various delegations of judicial authority to a federal magistrate pursuant to 28 U.S.C. § 636, and E.D.Pa. Local Rule 46. Those functions and duties would include monitoring, implementation and mediating functions for the various programs and disputes that might arise under the Judgment and Decree. *See* Judgment and Decree ¶¶ 10, 11, 15, 24, 25, 29, 41, 43, 44, 46, 47. This Court, in Post Decree Order #2 at ¶ 5, determined that those functions and duties should be delegated to a court-appointed special master under Fed.R.Civ.P. 53, as opposed to a federal magistrate. The Court made that determination based on one major and one minor consideration. First, of foremost consideration to the Court was that federal magistrates in this district are at present, as Judge Weinstein similarly held in *Hart v. Community School Board of Brooklyn, New York School District #21*, 383 F.Supp. 699 (E.D.N.Y. 1974), "[t]oo heavily engaged in their regular duties to acquire the expertise and spend the time required to advise the court in the matter at hand." *Id.* at 764. Magistrates in this district are particularly heavily engaged in an increasing number of social security appeals, criminal contempt matters arising from the Whitman Park litigation and prisoners' rights cases. This concern is especially timely in light of the recently adopted 1979 amendment to the Federal Magistrates Act which provides that jury trials in some criminal cases can now be held before federal magistrates, 18 U.S.C. § 3401. This enlarged duty only further serves to limit the time and resources a magistrate in this district could expend in a complex and lengthy litigation of the type presently before the bar. Second, the Court determined

any other costs which include, but are not limited to, costs incurred by the Advisory and Reporting Committee (¶¶ 42, 43), costs incurred in publicizing the Judgment and Decree (¶ 47) and costs incurred in the development of the retraining and upgrading programs, including special training of the Benjamin Franklin graduates (¶¶ 24, 41, 42).

Specific items that are *not* included as costs directly related to the injunctive aspects of this litigation include any assessment of damages which is specially reserved for Stage II of this litigation, plaintiffs' counsel fees, any amounts claimed by counsel on account of counsel's services[7] and any sums required by the Court to be paid as a direct consequence of any civil or criminal contempt arising under any of the Court's Orders heretofore or hereinafter issued.

II. *Taxation and Allocation of Injunctive Costs Generally*

A variety of arguments have been forcefully advanced by the various parties in their pleadings addressing the issues of the taxation and allocation of the costs related to the Court's Judgment and Decree. Many of these arguments go directly to the taxation and allocation of specific costs (*i.e.*, notice to class members; costs of the Mas-

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that a referral to a federal magistrate, as opposed to a court-appointed master, would constitute an unfair taxation of costs against the taxpayer. The costs for referral to a master to assist the Court in effectively implementing an injunction should more properly and fairly fall upon those parties whose discriminatory conduct necessitated the injunctive relief imposed, and not the taxpayer. *See Valenstein v. Bayonne Bolt Corporation*, 6 F.R.D. 363, 366 (E.D.N.Y. 1946); *General Motors Corporation et al. v. Circulators & Devices Manufacturing Corporation*, 67 F.Supp. 745, 746 (S.D.N.Y. 1946).

[7] The Court expressly reserves for future disposition the issue of the taxation and allocation of plaintiffs' counsel fees and costs incurred either during the liability determination or the injunctive formulation and implementation stages of this litigation.

ter), while others encompass the overall subject of taxation and allocation of injunctive-related costs. It is these general arguments that the Court will first address before moving on to a discussion of the assessment of specific costs against specific parties.

The major argument advocated by many of the named and unnamed defendants is that, although they have been held injunctively liable, they cannot be assessed costs related to that injunction when the only theory of liability upon which they were held injunctively liable is that of vicarious responsibility for the discriminatory acts of Local 542 and the JATC. Therefore, they argue, the Local and the JATC are the primary responsible or faulting parties and should be assessed the full injunctive costs.

The initial question is whether under Fed.R.Civ.P. 54(d) a party only held injunctively liable and not liable for damages may nevertheless be assessed costs related to that injunction. Several courts, including the Third Circuit Court of Appeals, have held in the affirmative. *See Jones v. Diamond*, 594 F.2d 997, 1022-1029 (5th Cir. 1979); *Samuel v. University of Pittsburgh*, 538 F.2d 991, 999 (3d Cir. 1976); *Kyriazi v. Western Electric Company*, 465 F.Supp. 1141, 1144-1148 (D.N.J.1979) (concerning Rule 54(d) and Rule 53(c) master's costs).

This Court concurs with the above courts for the simple reason that fairness demands that a party held responsible for the imposition of an injunction should bear a share of the costs needed to successfully *implement* that injunction and ensure the fulfillment of the injunctive mandate. A party which is a non-prevailing party in an injunctive action is as much bound by the provisions of Rule 54(d) as a non-prevailing party in a pure damage action. Payment of costs for injunctive relief naturally involves the payment of money, but the purpose of such payment is to implement that relief and does not constitute damages, in the classic sense, flowing to individual

prevailing parties from non-prevailing parties in the form of restitution, back-pay, etc.

The second issue before the Court presents a more difficult analysis; however, the Court finds helpful support in the decisions of several federal courts which have been referred to this Court by Local 542. Those decisions support the proposition that defendants held injunctively liable solely under a theory of vicarious responsibility are nevertheless liable for "a share" of the costs under Rule 54(d).

Preliminarily, there are several court-created doctrines that must be kept in mind when dealing with the issue of the taxation and allocation of costs under Fed. R.Civ.P. 54(d). Trial courts are vested with the sound discretion to allow and to apportion costs under Rule 54(d). *See Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 232-235, 85 S.Ct. 411, 415-416, 13 L.Ed.2d 248 (1964); *Harman Electric Co. v. First Real Estate Investment Co.*, 55 F.R.D. 195 (W.D.Pa.1972). Recently, the Third Circuit Court of Appeals reaffirmed this historical delegation in *Copperweld Steel Co. v. Demag-Mannesmann-Bohler et al.*, 624 F.2d 7 (3d Cir., 1980). The court held:

> Under Rule 54, the determination of which costs will be awarded to the prevailing party is a matter left to the sound discretion of the district court. *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 [85 S.Ct. 411, 13 L.Ed.2d 248] (1964). Although that discretion is not unbounded, it allows the district court a wide range within which its determination will not be upset by an appellate court. This is properly so since it is the district court's direct experience with the case which provides, in large part, the basis upon which the court decides which costs to allow.

At 9. The power of the Court is derived from the express language of Rule 54(d), which provides that costs are allowed to the prevailing party "unless the court

otherwise directs." This delegation under Rule 54 is based upon historical use whereby courts in equity allowed costs as a matter of discretion and not as a matter of right, the latter approach sounding in law. *See* 10 Wright & Miller, *Federal Practice and Procedure*, § 2668 at 141-142 n.34; 6 Moore's *Federal Practice*, ¶ 54.70[3] at 1305 n.2.

A trial court's determination concerning the taxation and allocation of costs will only be disturbed when an abuse of discretion is found. *Morgan v. Kight*, 294 F.Supp. 40, 41 (E.D.N.C.1968). Based on the critical notions of judicial practicality and fairness, costs must be assessed on a case-by-case basis, depending on the facts and equities of each case. *Hansen v. Bradley*, 114 F.Supp. 382, 384 (D. Md.1953).

Although the types of costs allowable under Rule 54(d) are defined in 28 U.S.C. § 1920, that list is not intended to be all-inclusive and is expandable unless a statute or rule dictates otherwise. *Gotz v. Universal Products Co.*, 3 F.R.D. 153, 155 (D.Del.1943). The test for expansion is whether the costs ordered or approved by the trial court are entirely essential for the proper consideration and determination of the case. *Prashker v. Beech Aircraft Corporation*, 24 F.R.D. 305, 314 (D.Del.1959). As to the issue of the proper allocation of court-ordered or -approved costs against non-prevailing parties, costs have been apportioned among both plaintiffs and defendants, *K-S-H Plastics, Inc. v. Carolite, Inc.*, 408 F.2d 54, 60 (9th Cir. 1969), and solely among the defendants in various proportionate amounts, *Warner v. Florida Bank & Trust Co. at West Palm Beach*, 160 F.2d 766, 772 (5th Cir. 1947).

Ultimately, the burden of challenging whether the taxation or allocation of costs is placed upon the non-prevailing party, which party must show why the costs should not be assessed, *Lichter Foundation, Inc. v. Welch*, 269 F.2d 142, 146 (6th Cir. 1959).

In light of these fundamental doctrines, defendant Local 542 has referred this Court to several decisions which bear upon the issues in the present case. Those decisions have held defendants liable for costs even though they were only injunctively liable under the theory of vicarious responsibility. Those courts have held that defendants primarily liable or responsible for active acts of discrimination should bear the costs *along with* other defendants who were only passively responsible. *See, e.g., Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1044-1045 (4th Cir. 1976) (court held that a defendant trustee of discriminatory trust, although a passive defendant by not actively discriminating, was not "a mere volunteer" and would be held injunctively liable and made to bear its "share of the costs" of the litigation but would not be assessed any damages); *Sagers v. Yellow Freight System, Inc.*, 388 F.Supp. 528, 532-533, 535 (N.D.Ga.1974) (although three union defendants were only passively responsible for discrimination, they were assessed one-half, equally apportioned, of attorney's fees and costs, with employer assessed the other one-half share since the employer was the primary responsible party; court held that this allocation scheme equitably apportioned responsibility for discrimination among the various liable defendants); *U.S. v. Masonry Cont. Ass'n of Memphis, Inc.*, 497 F.2d 871, 878 (6th Cir. 1974) (costs assessed against all defendants including union and contractor-employers who were properly joined, even though court overruled in part lower court's ruling that all employers injunctively liable; backpay only to be paid by union and some employers); *Hairston v. McLean Trucking Company*, 62 F.R.D. 642, 673-676 (M.D.N.C. 1974) (union as passive participant in discrimination only assessed one-third of costs and no damages, while two discriminating employers who were primarily responsible parties to pay two-thirds of the costs and back-pay; reasons for assessing costs against union was to serve as a penalty for discriminating and to promote purposes of Civil Rights Act of 1964 by en-

couraging those with the power to stop discrimination to use their positions). *See also Guerra v. Manchester Terminal Corp.*, 5 F.E.P. Cases 714, 715 (S.D.Texas 1973) (costs awarded equally among two defendant unions and employer along with backpay).

The Court is careful to note that the above cases are distinguishable from the instant action in two respects. First, in each of the above cases, the courts found that the defendants who were passively discriminatory nevertheless were aware in varying degrees of the discriminatory acts of the primarily responsible defendants. This might have prompted some courts to adopt the position of the *Hairston* court that costs would be assessed to promote the purposes of the civil rights statutes of encouraging those with power to stop discriminatory acts. In the instant case, the finding of liability was that the contractors' associations and the contractor-employers were not aware of the discriminatory entrance and referral practices of the Local's hiring hall, or even that they should have been aware of such discriminatory acts. Rather, Judge Higginbotham held that:

> Yet I find that the plaintiffs have failed to prove on a preponderance of the evidence that the associations or contractors viewed simply as a class were actually aware of the union discrimination affecting the employment of minority persons throughout the operating engineer industry in Local 542's jurisdiction. Such knowledge with actual participation in the hiring hall system would of course itself constitute intentional discrimination. I also find that not *all* contractors and associations may be said as a class to have had reasonable notice of the union's discrimination in view of the great number of contractors and the varying size and intensity of their work. Nevertheless, I find that the contractors and associations are injunctively liable to the plaintiff class under § 1981 as a result of their contractual relation-

> ship to and use of a hiring hall system which in practice effectuated intentional discrimination, whether or not the employers and associations knew or should have known.

469 F.Supp. at 401. However, this Court finds that the degree of responsibility or the degree of passivity is not an issue totally precluding those passive defendants from being assessed any injunctive-related costs but, rather, goes to the further question of what percentage of those costs they should bear in light of the finding of liability to date.

At present, the finding of collective injunctive liability carries with it a finding of shared responsibility not only for certain aspects of that injunction including reporting requirements and hour-and-wage goal requirements, but to collectively bear the costs that are necessitated by that same injunctive mandate. Basic fairness demands collective assessment. Again, notions of equity do come into play when a determination must be made as to what portion of the costs should be shared among the various parties. It is only that issue that goes to the degree of responsibility under the notions of primary and passive liability under a theory of vicarious responsibility. Fairness would be abrogated if the full share of injunctive-related costs were assessed against the primary responsible party, while at the same time the full share of the injunctive liability is not.

Intertwined with these critical notions is another distinguishing factor this case bears from the cases cited by Local 542 in its memorandum of law—that factor being that the costs assessed in each case concerned costs the plaintiffs had incurred during the course of the litigation and were not costs directly related to the implementation of injunctive relief. The important distinguishing point of this factor is that, while payment of plaintiffs' litigation costs would help to make the plaintiffs whole again and encourage plaintiffs in general to file discrimination

actions, *see New York Gaslight Club, Inc., et al. v. Carey*,——U.S.——, —— — ——, 100 S.Ct. 2024, 2029-2030, 64 L.Ed.2d 723 (1980), payment of injunctive costs serves another purpose—as previously stated, that being to effectuate the injunction by defraying costs that are necessarily built into that injunction and which must be paid in order to successfully further the injunctive relief ordered. In the present case, for example, the costs of notices to class members is essential in order to have notices sent to both plaintiff- and defendant-class members to, in all fairness, bind them to the injunctive relief ordered. Without notice, they cannot be expected to be bound by the injunctive requirements placed upon them as members of the defendant-class or to pay those costs associated with the injunction. *See In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1102-1106 (5th Cir. 1977). This type of cost does not further the purposes set forth in *New York Gaslight, supra*, but, rather, goes to the heart of the action—the injunctive relief requested.

In support of their position that defendants held injunctively liable under a theory of vicarious responsibility cannot be assessed costs, named party defendants Glasgow, Inc., and the three defendant contractors' associations refer the Court to the case of *Rios v. Enterprise Ass'n Steam-Fitters Local 638 of U.A.*, 400 F.Supp. 988 (S.D.N. Y.1975). There, the court held that the primary force behind the discrimination against minority workers was Local 638, but held the Local, the Mechanical Contractors Association ("MCA") and the Steamfitters' Joint Apprenticeship Committee ("SJAC") injunctively liable. As to the liability of MCA, the *Rios* court held:

> *MCA.*—Plaintiffs seek to have MCA share in the burden of providing back pay. MCA, a trade association of certain contractors in the New York area, acts only in collective bargaining negotiations between its members and Local 638. MCA does not em-

ploy steamfitters; rather, employment is done by its members. While MCA was found to have been properly made a party defendant in the *Rios* action (360 F.Supp. [979] at 994-95), that finding did not imply that MCA was "responsible *ipso facto* for all the employment practices here found unlawfully discriminatory or . . . liable in damages to the plaintiffs in Rios. Plaintiffs have shown no specific instances of MCA discrimination. Rather, plaintiffs have demonstrated only that there has been a lack of nonwhite employment in the industry generally and that, in consequence, the industry's referral practices must be changed." *Id.* at 995-96.

400 F.Supp. at 992. The Court also held:

> The JAC is a non-profit joint labor-management committee which, now as well as during the time preceding issuance of the permanent injunction in this action on June 21, 1973, conducted the steamfitters' apprenticeship program. However, JAC was not found to have purposefully discriminated against members of the plaintiff class. JAC adopted the aptitude tests used to screen applicants to the apprenticeship program in good faith upon the recommendation of experts.

400 F.Supp. at 997.

Finally, as to the issue of costs, the court found that Local 638 alone should be assessed the plaintiffs' full costs and that no costs should be assessed against either the MCA or the SJAC. 400 F.Supp. at 998.

The applicability of the *Rios* decision to the instant action must be seriously questioned. First, the *Rios* court offered no authority or rationale as to why the Local alone should bear the plaintiffs' full costs, where all the defendants were found injunctively liable. Furthermore, the *Rios* court not only assessed all the costs against Local 638 but awarded backpay to the plaintiffs to be paid solely by the Local. In the instant action, no damages of

any kind have been assessed against any defendant. That issue has been expressly reserved for Stage II of the litigation. Therefore, whether the *Rios* court, faced with the instant factual and legal scenario, would have assessed costs in a similar manner is questionable and only serves to undermine any precedential weight the decision might have otherwise held. Finally, as Judge Higginbotham noted in his liability decision in this case, on appeal of the *Rios* decision, the Court of Appeals for the Second Circuit *in dictum* appeared to equivocate when discussing the potential liability of MCA. In that regard, the circuit court held:

> The *Rios* plaintiffs argue, not without reason, that this relief could not have been ordered absent a finding of discrimination by MCA, purposeful or otherwise, and that all that is required to establish MCA's liability for backpay is the finding of discrimination; indeed, mere acquiescence in the discriminatory acts of the union would render it liable. *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d [1364] at 1381-82; *Macklin v. Spector Freight Systems, Inc.*, 156 *U.S.* App. D.C. 69, 478, F.2d 979, 989 (1973). *See also Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), *petition for cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971). Absent any specific finding of discrimination, however, we conclude the district court's finding of nonliability on the part of MCA is not an abuse of discretion. *Guerra v. Manchester Terminal Corp.*, *supra*, 498 F.2d [641] at 655-56. As the district court held, making MCA a party defendant did not imply that MCA was "responsible *ipso facto* for all the employment practices . . . found unlawfully discriminatory or . . . liable in damages to the plaintiffs in *Rios*. Plaintiffs have shown so [*sic*] specific instances of MCA discrimination." 360 F.Supp. at 995. And the union certainly had primary responsibility for the discrimination. We note that the decision below was with-

> out prejudice to any claim a member of the plaintiff's class may have against an employer, but MCA was not itself an employer, and no employers are parties to this action. *See* 400 F.Supp. at 992 n.4.

Equal Emp. Op. Com'n v. Enterprise Ass'n Steamfitters, 542 F.2d 579, 589 (2d Cir. 1976).

In regard to that language, Judge Higginbotham stated:

> It may be inferred from the above dictum that acquiescence (presumably involving some meaningful level of knowledge or notice) constitutes sufficient involvement by a contractor's association to require holding it liable for back pay relief under Title VII. But it may be inferred from the holding that either back pay liability or injunctive liability without back pay may be imposed in the absence of "acquiescence" and without specific discriminatory acts in the discretion of the trial court. Certainly neither the district court opinion nor the Court of Appeals' opinion in *Enterprise Association Steamfitters* supports the conclusion that an association or employer bearing a legal contractual relation to a union is insulated from liability for the union's discriminatory acts in the absence of participation in or knowledge of such acts. Indeed, the Court of Appeals' affirmance of injunctive liability in the absence of "any specific finding of discrimination" supports an opposite conclusion.

469 F.Supp. at 405-406.

Finally, the *Rios* decision concerned the assessment of plaintiffs' costs incurred throughout the litigation, of which "97% of these costs [were] attributable to court reporters' fees and the costs incident to taking depositions." 400 F.Supp. at 997. As discussed previously, plaintiffs' litigation-related costs are distinguishable from injunctive-related costs, because their imposition serves

different purposes and brings into consideration notions of fairness that may not be as compelling when assessing litigation costs. For present purposes, the Court finds that the imposition of injunctive-related costs against both the primary and passive responsible defendants in the action is necessary and fair and is an issue that was not raised in the *Rios* case. Therefore, this Court believes it is not bound by nor persuaded to follow that decision.

III. *Taxation and Allocation of Injunctive Costs Proportionately Against the Defendants and the Time Schedule for Cost Taxation*

In resolving that all defendants shall pay the injunctive costs, two additional questions follow—those being, which defendant parties should pay what share of those costs and at what point in time?

In regard to the percentage allocation of costs set forth in Post Decree Order #10, that assessment was made upon what the Court believed to be the delineated degree of responsibility of the defendants for the discriminatory acts, as set forth by Judge Higginbotham in his findings of fact and conclusions of law. The allocation was not made with mathematical precision and cannot be. Rather, it was based upon what the Court perceived to be the participation in and knowledge of the various parties of the discriminatory acts found. Local 542 and the JATC, as the primary responsible parties, were assessed the greatest share of the costs. The contractors' associations, whose involvement in and apparent knowledge of the discriminatory acts found was not as great, were assessed a lesser percentage but more than Glasgow and the defendant-class of contractor-employers who were found to not have had any knowledge of the discriminatory actions by the Local and the JATC, nor actually negotiated collective bargaining agreements with the Local nor been signatories to the previous "Affirmative Action Program" which was found by Judge Higgin-

botham to be founded upon distorted statistics, *see* 469 F.Supp. at 342-345, 384, and only constitutes one contractor-employer as opposed to the associations which contain substantially more members.

Regarding the issue of the equal percentage allocation among the three contractors' associations, the Court understands that those associations differ in size by total membership. However, the Court cannot attempt to base the allocation strictly on total membership figures because, first, all three associations were found equally liable under the same statute and theory of liability. Second, membership figures alone do not indicate the total number of operating engineers each association member has employed since 1965 or the number of hours they have worked; nor does it indicate the financial resources of each member or the amount of dues paid into the association by members, if those two factors were found to be relevant. These types of calculations, if they could ever be reliably made, would require detailed and lengthy discovery and hearings, both of which the Court at this time cannot afford to commence because the delay that would be occasioned by these procedures would serve to further prejudice both plaintiff and defendant parties. Even if the calculations could be made, they would probably concern the types of matters that are best designed for disposition by the Master, which would incur additional costs to the parties. Finally, any inequities that might have been or will be occasioned by the Court's present equal allocation scheme by association will be cured during the contribution phase of the litigation, which is discussed in detail below. For present purposes, the Court finds the costs percentage allocation method covered to be substantially fair in light of the liability findings of Judge Higginbotham regarding the responsibility and knowledge each party had of the discriminatory acts committed.

Several practical considerations dictate the resolution of the second question concerning the time frame in

which to tax costs. The class of defendant contractor-employers is composed of approximately 1400-1500 members, scattered throughout Eastern Pennsylvania and Delaware. The initial injunctive costs that are required to promptly effectively implement the injunction include costs of notices to plaintiff- and defendant-class members, a publicity program to advise plaintiff-class members of their rights under the Judgment and Decree, the initial costs of the Master and preliminary costs relating to training and upgrading programs. These costs are presently needed to implement the initial stages of injunctive relief that, if delayed, would serve to further frustrate the rights of plaintiffs and possibly extend the length of the Decree, which would prejudice defendants. This delay would realistically result if the Court were required to collect sums from approximately 1400 contractor-employers. Furthermore, the 1400 unnamed defendant-class members have only recently received notice of the Judgment and Decree. Such notice packages were mailed August 29, 1980, due to excusable delay caused by pending motions to amend the Decree which had been filed by the parties and which had to be first resolved by the Court before notices could be sent. As previously discussed, it would be fundamentally unfair to assess costs of notices or any costs against defendants who had not yet received notice of their responsibilities and duties under the Judgment and Decree that resulted in those same costs. It was for these two important reasons that the costs of the injunction were assessed against those defendants who were both readily and easily determinable and accessible to the Court and had also received notice of the Judgment and Decree by their very participation in this lawsuit through the liability and the initial injunctive stages of this case. Therefore, the Court found that, in the interests of due process and judicial efficiency and economy, the costs should be assessed solely at this time against named party defendants.

(A) *Contribution*

The Court in Post Decree Order #10 spoke of a right of contribution being available to named party defendants against unnamed party defendants for the initial costs assessed. A further explanation of that right, the Court believes, would be beneficial at this time.

In the recent case of *Glus et al. v. The G. C. Murphy Company et al.*, 629 F.2d 248 (3d Cir., 1980), the Third Circuit Court of Appeals held that:

> Initially most American courts held that there was no right of contribution under the common law, relying on the English decision *Merryweather v. Nixan*, 8 Term R. 186, 101 Eng.Rep. 1337 (K.B. 1799). *See, e.g., Union Stock Yards Co. v. Chicago, Burlington, & Quincy Railroad Co.*, 196 U.S. 217 [25 S.Ct. 226, 49 L.Ed. 453] (1905). This prohibition resulted from the belief that a wrongdoer should not be able to shift the responsibility of his actions to the shoulders of another. The rule prohibiting contribution has come into disrepute. It is now widely recognized that fundamental fairness demands a sharing of the liability. Without a right of contribution a wrongdoer may escape liability for his actions because of the happenstance of the plaintiff's choice of defendants. *See* Prosser, *The Law of Torts*, § 50 (4th ed. 1971). *See also* Sellers, *Contribution in Antitrust Damage Actions*, 24 Vill.L. Rev. 829, 855-63 (1979) (reviewing state law on contribution). The vast majority of the states have now rejected the prohibition either by statute, *e.g.*, Del.Code tit. 10, §§ 6301-08; Pa. Cons.Stat.Ann. tit. 42 §§ 8323-27 (Purdon 1979), or by judicial action. *E.g., Knell v. Feltman*, 174 F.2d 662 (D.C.Cir.1949); *State Farm Auto Insurance Co. v. Continental Casualty Co.*, 264 Wis. 493, 59 N.W.2d 425 (1953).

At 252.

Although the *Glus* decision was a Title VII action, this Court finds that, in this joint Title VII and § 1981 litigation, general notions of fundamental fairness dictate that parties collectively injunctively liable are collectively liable for costs related to that same injunction. In that vein, the finding and rationale of the *Glus* court is equally applicable that the unnamed contractor-employer defendants "can't escape liability for [their] atcions because of the happenstance of the plaintiff's choice of defendants." *Id.* This is especially true of costs for injunctive relief which directly relate to actions and responsibilities of all the defendant contractor-employers in satisfying their injunctive responsibilities.

The right of contribution of costs shall only accrue to the three defendant contractors' associations and Glasgow which, along with the other unnamed defendant contractor-employers, were held injunctively liable solely under § 1981 upon the theory of vicarious responsibility for the active discriminatory acts of the Local and the JATC.

The right of contribution will not accrue to Local 542 or the JATC because they were found to be primarily responsible for the discriminatory actions. They will not, therefore, be permitted to further spread the burden of their wrongdoing on those parties who were only passively discriminatory beyond the share of costs that have already been assessed by this Court against the other defendants. The right of contribution is based upon the principle that parties equally responsible for wrongdoing shall equally pay for that wrongdoing. Prosser, *The Law of Torts*, § 50 (4th ed. 1971). Where, as here, the parties are not equally responsible, then the responsibility shall be shared in an equitable fashion, which this Court believes has been done.

The measure of contribution from unnamed defendant contractor-employers should be based upon the percentage share of hours each of those defendants has or will re-

port to the Local 542 pension and welfare fund for the period January 1, 1980, to December 31, 1980. This is the period during which the majority of the injunctive costs will be paid. The Court understands from the representations of the plaintiffs that the percentage share of hours reported to the fund is based upon the number of hours worked by operating engineers from the Local for each particular contractor-employer. During this model period, for example, if Contractor "X" reported to the pension fund of the Local .5% of the total hours of all those hours reported to the pension fund by all the reporting contractor-employers in the five districts of Local 542, then the potential liability of that contractor for contribution would be .5% of 35% of the total costs paid as of the date the contribution action is commenced. The 35% represents the percentage of the total injunctive costs that the three contractors' associations and Glasgow have been assessed. Therefore, the three contractors' associations and Glasgow could each separately, or collectively, seek contribution from any or all of the unnamed defendant contractor-employers who are members of the defendant-class. This right will accrue at any time in the future. If Glasgow sought a right of contribution from the same Contractor "X", it would be entitled to recover .5% of 5% of the total costs paid as of the date the contribution action was commenced. While individual contribution actions are permissible, the Court believes that one collective contribution action by all three of the contractors' associations and Glasgow, against all the unnamed defendant contractor-employers who are members of the defendant-class, would be more efficient and less burdensome for all parties concerned.

Through this availability of a viable right of contribution which the Court believes is a fair and sound equitable remedy, a proper balance can be maintained between competing concerns. On the one hand, those defendant parties who by happenstance were named defendants in this action and found liable solely under a theory of vicarious responsibility can share the costs they have

been required to pay for the implementation of the injunction with the other wrongdoers who were also found vicariously liable; and, on the other hand, the Court is not presently hampered in effectively and promptly collecting those initial injunctive costs which are needed to prevent undue delay and prejudice to all parties under the Judgment and Decree. The Court finds that the method and manner of cost allocation, that has been heretofore ordered, fairly and justly serves both of these competing interests.

IV. *Assessment of Specific Costs Against Specific Parties*

Aside from the general arguments as to whether injunctive costs as a whole should be assessed against certain defendants based upon the degree of responsibility they bear for the acts of discrimination, additional specific arguments have been raised by the defendants that relate to the further question of whether certain injunctive costs should be borne by certain defendants. These arguments are not delineated based on notions of responsibility or liability as the above general arguments were based, but instead are directed toward two issues: (1) whether unnamed as opposed to named party defendants should bear any of the injunctive-related costs; and, (2) whether certain defendants, either named or unnamed, should bear specific costs as opposed to each bearing a percentage share of the total injunctive costs.

(A) *Assessment of Costs Against Unnamed Defendant-Class Members*

Unnamed defendants Bechtel Power Corporation ("Bechtel") and United Engineers & Constructors, Inc. ("United Engineers"), represented by separate counsel, have filed with the Court legal memoranda addressing the imposition and allocation of costs against unnamed defendant-class members. Their arguments center around the language of Fed.R.Civ.P. 54(d) (concerning the imposition of costs, including class notices, the publicity

program, etc.) and Fed.R.Civ.P. 53 (which specifically deals with the costs of a court-appointed master).

Rule 54(d) provides that costs should be awarded to the "prevailing party." Bechtel and United Engineers argue that this rule conversely implies that costs are to be assessed against the "nonprevailing party." They argue that they, as unnamed defendant-class members, are not parties to this litigation because they were neither named in nor served with the complaint in this case. Similiarly, Rule 53(a) states that the costs of the Master "shall be charged upon such of the parties . . . as the court may direct."

They cite in support of their argument several district court decisions concerning either the imposition of discovery devices, *see Lamb v. United Security Life Company*, 59 F.R.D. 44, 48-49 (S.D.Iowa 1973); *Wainwright v. Kraftco Corporation*, 54 F.R.D. 532-534-535 (N.D.Ga. 1972); *Fischer v. Wolfinbarger*, 55 F.R.D. 129, 132-133 (W.D.Ky. 1971), or the assertion of counterclaims against unnamed or absent class members, *see In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 349 (E.D.Pa. 1976); *Donson Stores, Inc. v. American Bakeries Company*, 58 F.R.D. 485, 488-489 (S.D.N.Y. 1973).

A careful review of these cases, and the rationale asserted in each, persuades the Court that they are not applicable in the present action concerning the imposition of injunctive costs against unnamed defendant-class members for several reasons.

Basically, four major arguments have been repeatedly advanced by the above courts concerning the use of discovery devices or counterclaims against absent class members. First, a few courts argue that, because Fed.R. Civ.P. 23 does not designate absent class members as "parties," then they are not parties. This argument is specious at best because neither does the rule state that absent class members are *not* parties. Second, several courts have contended that the purpose of the class action rule is to avoid a massive joinder of parties who are too

numerous in the first instance to undertake individual actions. Therefore, those courts hold that declaring absent class members as parties and imposing discovery and counterclaims procedures upon them would flood the courts with an influx of parties and their attorneys, which would only serve to frustrate the purpose and design of Rule 23 class actions under which a class representative is to represent the interests of the class. The Court believes that those concerns might be legitimate during the pretrial or trial stages of a class action. However, those same concerns dissipate when speaking of the post-trial injunctive stage of the case. At that stage, absent class members have already been found injunctively liable. In effect, the imposition of liability against the defendant-class has the effect of creating a massive joinder by creating a panoply of duties and responsibilities to be shared equally by all members of the class and not merely the class representative. Once the injunction is implemented, absent class members do not and cannot remain passively behind the shield of the class representative as they may have done previously throughout the litigation. At that stage, they must take an active role in furthering the injunctive relief ordered by the Court, which entails as one of its responsibilities the imposition of costs. To hold to the contrary would completely abrogate the purpose and design of Rule 23(b)(2) defendant-class actions.

Third, many courts have relied upon Rule 23(d)(2),[8] which allows courts to direct that absent class members

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[8] Fed.R.Civ.P. 23(d)(2) provides, in pertinent part:

> (d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders:
>
> * * * *
>
> (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed

be given notice that they have the option of appearing through their own counsel instead of being represented by the class representative. Respectively, this Court can find no language in the rule, as the above courts have, stating or even implying that once an absent class member pursues his or her Rule 23(d)(2) option and appears in court through independent counsel that they only then become "parties" to the action. What procedural status they may have had before that apperance is unclear—"non-parties"?

In the instant action, Judge Higginbotham early in the litigation did direct that notices be sent to unnamed defendant-class members informing them of the pendency of this litigation and that they may be members of the defendant-class. Ironically, both Bechtel and United Engineers did so appear through their own counsel and have continued to be so represented throughout the pendency of this suit and have filed their own separate responses to the imposition of costs against defendant-class members. However, the Court is not persuaded, for purposes of this stage of the litigation, by the Rule 23(d)(2) argument that only when the 23(d)(2) option is exercised does an absent class member become a party. The Court is not so persuaded because, as mentioned before, where a passive role might be appropriate for absent class members *prior* to a finding of injunctive liability, once the injunction is entered, those passive members become involuntary active members, with all the duties and responsibilities imposed on named parties, including the class representative. *See* Note, 91 Harv.L.Rev. 630, 647-650 (1978). Furthermore, in *Donson*, *supra*, upon which defendants rely, the court specifically stated that, "if liability was established, other issues, including damages

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extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action. . . .

and counterclaims can be handled on a class member-by-class member basis." 58 F.R.D. at 489-490. This is exactly what has resulted in the instant imposition of costs.

Finally, the last argument advanced is that the imposition of discovery or counterclaim devices against individual absent class members would destroy the classwide texture of class actions. For present purposes, to impose costs only against the class representative and not the other equally liable members of the class would also destroy the class-wide imposition of collective injunctive relief.

In conclusion, it should also be noted that the cases cited by the unnamed defendants have not received the full support of other courts. In *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999 (7th Cir. 1971), the Court of Appeals for the Second Circuit held that absent class members could be served with interrogatories because:

> [i]t is true that an absent class member is given a "free ride" under Rule 23 and has no duty to actively engage in the prosecution of the action. Yet the absent class member's interests are identical with those of the named plaintiff and his rights and liabilities are adjudicated in the principal suit. If discovery from the absent member is necessary or helpful to the proper presentation and correct adjudication of the principal suit, we see no reason why it should not be allowed so long as adequate precautionary measures are taken to insure that the absent member is not misled or confused. While absent class members should not be required to submit to discovery as a matter of course, if the trial judge determines that justice to all parties requires that absent parties furnish certain information, we believe that he has the power to authorize the use of the Rules 33 and 34 discovery procedures.

Id. at 1005. *See also American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 551, 94 S.Ct. 756, 765, 38 L.Ed.2d 713 (1974) ("claimed members of the [23(b)(3)] class stood as *parties* to the suit until and unless they received notice thereof and chose not to continue") (emphasis supplied); *McCubbrey v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62, 72 (N.D.Cal. 1976) ("[a]bsent class members are parties to an action, properly before the court, and are subject to its judicial orders").

(B) *Assessment of a Percentage Share Rather Than a Specific Share of the Costs*

In answering this contention, several basic notions must be reexamined and a few new factors raised. The Court believes that an argument could be made that some costs of the injunction could be traceable to particular defendants. For example, the cost of notice to unnamed contractor-employer "X" has already been paid in some proportionate amount by all of the named party defendants, although the cost is directly applicable to that contractor. However, just focusing on the costs of notices, as emphasized before, one of the utmost concerns of the Court in imposing the initial injunctive-related costs was to accomplish that task with undue delay but in a substantially fair manner. That entailed assessing all the initial costs in the first instance against named party defendants. Second, as also mentioned before, the cost of notice or any other cost could not in the interests of fundamental fairness be assessed against the party receiving notice until that notice was received and read. Third, the right of contribution will cure this necessary imposition of costs if any inequities can be said to have resulted, because the percentage share of contribution sought from each contractor-employer will subsume this initial cost of notice and many other costs as part-and-

parcel of the contribution share recovered by the named party defendants.

Fourth, aside from the due process concerns of the costs of notices to class members, the clearly foreseeable problems that would flow from a method of taxation of specific costs against individual defendants are manifold. For example, how can it be determined whether the costs associated with the publicity program envisioned under ¶ 47 of the Judgment and Decree are directly attributable or traceable to any particular defendant? Should the approach be which defendant will ultimately receive the "benefit" of that program? Will the Local or the JATC bear the "benefit" of the publicity program because arguably the program will result in additional plaintiff-class members entering the Local or the JATC, thereby helping in enabling them to better reach their percentage goal requirements for new entrants? Or, will the ultimate benefit of the program be to those individual contractor-employers who will ultimately be referred those minority operating engineers who were recruited through the publicity program and, in turn, their influx will enable those contractor-employers to better meet their hour-and-wage goals under the Decree? Another example would be costs associated with the upgrading and training program under the Decree. Is this program really benefitting the Local because they will be receiving newly trained minority entrants or is it benefitting the contractor-employers who will eventually benefit from the newly acquired or reinforced skills possessed by minority operating engineers referred to them?

On the other hand, should the approach to use in taxing costs be one of determining which defendant(s)'s prior discriminatory actions *necessitated* the imposition of a particular injunctive-related cost? For example, are the costs of the training and upgrading program

attributable in some way to the discriminatory acts of the Local as found by Judge Higginbotham in his findings of fact and conclusions of law? The answer is clearly "no" because Judge Higginbotham found *all* defendants injunctively liable and, therefore, collectively responsible for *all* the discriminatory acts of the past, although under different statutory bases and theories. Once again, the degree of responsibility should not affect whether *any* costs should be paid but only the proportionate *share* of costs that should be paid.

Therefore, the obvious conclusion that must be reached after going through this speculative analysis is that neither approach founded upon either a benefit or responsibility theory to determine the taxation of specific initial injunctive-related costs is practical or desirable. The quagmire of endless conjecture and, hence, litigation into which the Court would be thrust is manifest. As a result, the Court is convinced that the approach taken in Post Decree Order #10 using an across-the-board percentage share allocation, with the right of contribution, is the soundest method from practical, due process and judicial economy points of view.

However, the Court is quick to point out that there may be one notable exception to the above conclusion—that being those costs associated with the court-appointed special master in this case. While the United States Supreme Court in the case of *Newton v. Consolidated Gas Co.*, 259 U.S. 101, 42 S.Ct. 438, 66 L.Ed. 844 (1922), held that the rate of compensation and the allocation of the costs for the payment of special masters is a matter within the sound discretion of the trial court and is subject to review only in cases of the abuse of that discretion, or where the allocation was erroneous as a matter of law, 259 U.S. at 105, 42 S.Ct. at 439, various formulas have been adopted by the courts in making this allocation.

One line of authority, with which this Court fully concurs, holds that the cost of a master should be borne by the party or parties whose conduct *necessitated* the reference to the master. *See Valenstein v. Bayonne Bolt Corporation*, 6 F.R.D. 363, 366 (E.D.N.Y. 1946); *General Motors Corporation v. Circulators & Devices Manufacturing Corporation*, 67 F.Supp. 745, 746 (S.D.N.Y. 1946). The costs of the Master in this case to date have substantially involved matters that have not been necessitated by the conduct of any particular party. Rather, the costs have pertained to services of the Master that were generally necessitated by the duties imposed under the Decree relating to and affecting all parties. *See* Post Decree Order #15, at Appendix A-1, and the Court's Order of September 10, 1980 (detailing the services provided by the Master). Specifically, these services have included the development and implementation of the publicity program, assistance in and review of the procedures used in mailing notices to class members and attending meetings of the Advisory Committee concerning the development and implementation of upgrading and training programs.[9] However, there are certain future costs flowing from the duties and responsibilities of the Master which the Court believes will be particularly necessitated by the conduct of an individual party. For example, a grievance or dispute hearing initiated by a plaintiff minority class member against a particular employer would be the type of specific cost that could be said to be directly attributable to a particular defendant.

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[9] To the extent that any of the costs of the Master paid by the named defendants to date can be said to have been necessitated by the conduct of a particular defendant or defendants, the Court will grant leave to the three contractors' associations and Glasgow to affirmatively prove by a clear preponderance of the evidence that a particular defendant or defendants should be assessed a sum representing the costs of the Master that are directly related to a particular matter involving that defendant or defendants.

Conversely, if a grievance proceeding initiated by a plaintiff class member would be found by the Master or the Court to have been either frivolous in nature or brought in bad faith, the costs of the Master in that proceeding should be shifted to that individual plaintiff and not the defendant employer. These are matters that the Court believes might require a future reassessment of the manner by which particular injunctive costs should be allocated among the defendants. However, the Court will only consider their application on a case-by-case basis and only where the costs can be clearly and convincingly shown to be attributable to or necessitated by the actions of a particular party and not merely be an exercise in endless speculation and waste of judicial resources.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 71-2698

COMMONWEALTH OF PENNSYLVANIA, *et al.*

v.

LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS *et al.*

Aug. 8, 1979

JUDGMENT AND DECREE

A. LEON HIGGINBOTHAM, Circuit Judge.*

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* United States Circuit Judge sitting by designation.

† Page numbers adapted to conform to pagination of this Appendix.

I. DEFINITIONS

1. As used herein, unless the context clearly requires a different meaning, the term "defendants" shall refer to the following:

(a) Local 542, International Union of Operating Engineers (Local 542);

(b) Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania and Delaware (JATC);

(c) Contractors Association of Eastern Pennsylvania (CAEP), General Building Contractors Association, Inc. (GBCA), United Contractors Association (UCS), Pennsylvania Excavating Contractors Association (PECA), and all other employer associations who have been parties to a collective bargaining agreement with Local 542 at any time between November 8, 1965 and the date of this Decree; and,

(d) Glasgow, Inc., and all other employers who have been parties to a collective bargaining agreement with Local 542 and who hired at least one operating engineer affiliated with Local 542 at any time between November 8, 1965, and the date of this Decree.

2. As used herein, the term "collective bargaining agreement" shall mean the labor agreement currently in effect between Local 542 and participating contractors and contractors associations or, where the context so requires, a subsequent version of that agreement.

3. As used herein, the term "first year" shall mean the period beginning on the date of this Decree, and ending on March 31, 1980. Each subsequent year will begin on April 1 and end the following March 31st.

4. (a) As used herein, the term "minority" or "minorities" shall include blacks, Spanish-surnamed Americans, Asians, and American Indians.

(b) As used herein, the term "percentage of minorities in the community" or similar terms refer to the per-

centage of minority males between the ages of 18 and 65 in the population. The percentage of minorities in the community for each district is set forth in paragraph 16.

II. PERMANENT INJUNCTION

5. Defendants shall not discriminate against any minority person because of his color or national origin, with respect to acquisition, retention of membership or affiliation in said local union, with respect to referral and selection for employment, with respect to any training, retraining or upgrading programs, or with respect to any other terms and conditions of employment, union membership or affiliation.

6. No person shall be retaliated or discriminated against by any of the defendants, their agents, officers, employees or their successors in office, because that person has opposed any practice of defendants challenged in this lawsuit, because that person is a member of the class represented by plaintiffs or because that person has made a charge, testified, assisted or participated in any manner in any stage of the investigation, proceeding or hearing of this case.

7. Moreover, it shall be a violation of this Judgment and Decree for any defendant to deny, deprive, or attempt to deny or deprive, any individual member of the plaintiff class of a right or benefit to which he is entitled by the terms and provisions of the Judgment and Decree. It is the Court's specific purpose and intent in entering this order that all members of the plaintiff class shall share and participate equally, to the maximum extent possible, in the class-wide employment opportunities and rights created herein. It shall be a violation of the Decree, therefore, for any defendant to single out particular plaintiff class members for the purpose of denying them any relief herein to which they are entitled.

8. Further, a strike, work-stoppage or work slowdown by any officers, agents, members or affiliates of Local 542, or by any persons acting in concert with any officers,

agents, members or affiliates of Local 542, which has as its purpose the interference with the operation of this Decree, shall constitute a violation of this Decree. Local 542 is obligated to make a good faith effort to prevent or end any such violation. Such a violation shall subject Local 542, its officers, agents, members and affiliates participating in the strike, work-stoppage or work slowdown to the contempt power of the Court. This clause shall operate regardless of whether the strike, work-stoppage or work slowdown is authorized by Local 542. However, nothing in this Decree shall prohibit a strike, work-stoppage or work slow-down by Local 542, its officers, agents, members or affiliates, the purpose of which is other than the interference with or the thwarting of the operation of this Decree.

III. UNITED STATES MAGISTRATE

9. Pursuant to Local Rule 46 and 28 U.S.C. § 636, the Court shall designate a United States Magistrate for the Eastern District of Pennsylvania to have primary responsibility for overseeing the implementation of this Decree.

10. (a) Except for any matter expressly required by this Decree to be presented directly to the Court, any disputes among the parties regarding the interpretation or implementation of this Decree shall be presented in the first instance to the Magistrate. No party shall present any dispute to the Magistrate unless the party has first notified the other affected parties and made a good faith effort to resolve the matter by agreement. Unless the Decree or an order of this Court specifies a different period, any party may appeal any decision of the Magistrate under this Decree, including any decision made pursuant to this paragraph, by filing a request for review with this Court within ten (10) days of such decision. Delays beyond this ten day period shall be allowed upon a showing of good cause.

(b) In addition to the powers specified in this Judgment and Decree, the Magistrate shall be empowered to take all actions, including the establishment of such

record-keeping requirements, as may be deemed necessary to implement and insure strict compliance with the terms and provisions of this Decree. The Magistrate shall hear and determine all complaints concerning the operation of this Judgment and Decree and shall decide any questions of interpretation, claims of violations, and questions of remedies that may be necessary and appropriate. The Magistrate shall act either on his own initiative or at the request of any interested person or party. All decisions of the Magistrate shall be either in writing or dictated to a court reporter who shall prepare a transcript of such decisions.

Nothing contained herein shall give the Magistrate the right to amend or modify the substantive terms and provisions of this Judgment and Decree, other than as specifically granted, nor shall the Magistrate have any power and authority other than that granted to him in this Judgment and Decree. Any request for modification of this Decree or any of its provisions, other than those modifications that the Magistrate is specifically empowered to make, shall be submitted directly to the Court. The Magistrate shall have the power to suggest modifications or amendments of this Judgment and Decree.

11. The Magistrate shall have the assistance of a six-member Advisory Committee, three members of which shall be selected by the Plaintiffs and three by the Defendants.

IV. GOALS

12. It shall be the goal of this Decree that the number of hours worked by minorities equals the percentages of the total hours worked in each district and in each year as is set out below:

	1st year	2nd year	3rd year	4th year	5th year
District 1	12 %	14 %	16 %	18 %	18 %
District 2	1.1%	1.3%	1.3%	1.3%	1.3%
District 3	.5%	.7%	.7%	.7%	.7%
District 4	2 %	2.6%	2.8%	2.8%	2.8%
District 5	8 %	10 %	12 %	12.4%	12.4%

The Court may alter these goals on the basis of the 1980 United States Census or as provided in paragraphs 29 and 44. It shall also be the goal of this Decree to ensure in each year that in each category of union membership or affiliation (including group I, group I-A, group II, and group III membership in the parent body of Local 542, and membership in C Branch and in the Apprenticeship Program) in each district, except to the extent that differentials can be shown to be justified by nondiscriminatory factors, the average number of hours worked by minorities equals that worked by whites. To facilitate the Achievement of these results, the defendant employers and Local 542 shall have the specific obligations set forth in the succeeding paragraphs.

13. In calculating the number of hours worked by minorities, only the first 50 hours worked by any individual minority operating engineer in any week will be counted unless it is shown that any hours worked in excess of 50 *are not* the result of an attempt to distort the reporting statistics. Any of the first 50 hours may be discounted if it is shown that such hours are a result of an attempt to distort the reporting statistics.

V. UNION OBLIGATIONS

14. (a) Except as authorized by this Decree, Local 542 shall make all referrals in accordance with the procedures set forth in the collective bargaining agreement.

(b) In addition to the regular out-of-work lists contemplated by the collective bargaining agreement, Local 542 shall maintain out-of-work lists composed only of minority persons, divided into priority groups in accordance with the collective bargaining agreement.

(c) Local 542 is authorized to make referrals directly from the minority out-of-work lists in response to employer requests for minority employees made pursuant to paragraph 27 or at its own initiative pursuant to paragraph 15.

15. The percentage of minorities referred by Local 542 must at least equal those set forth in paragraph 12. If, at the end of the first year (as defined in paragraph 3), the goal for minorities' hours set forth in paragraph 12 has not been met in any district, the Magistrate may increase the minimum rate at which minorities must be referred.

16. Local 542 shall admit into its total membership and affiliation at least one minority for every one available non-minority admitted during the first two (2) years this decree is in effect. Thereafter, Local 542 shall admit at least one minority for every two non-minorities admitted. This ratio shall be followed until the racial composition of Local 542 and of its five districts reach the minority percentage in the community for each of the five districts and the union as a whole; provided, however, once a particular district attains it appropriate minority percentage (for example, 18% for District I) this one-for-one ratio shall no longer be applied in that district. Those percentage goals are set forth below:

District I	18.0%
District II	1.3%
District III	.7
District IV	2.8
District V	12.4

These goals may require reassessment after the release of the 1980 United States Census. Therefore, the Court may increase or decrease these percentage goals, as the case may be, either on its own motion or upon request by any party.

17. The procedures and criteria for each method of entry as a member of the parent body of Local 542 or as a registrant with Local 542 shall be set forth in a notice, which shall be posted in a conspicuous location in the hiring hall of each district of Local 542 and in the offices of each defendant employer. Local 542 shall also make the notice readily available to its members and

affiliates and any interested members of the public. The parties shall attempt to agree on the contents of the notice; if they are unable to agree, the matter shall be presented to the Magistrate. Local 542 shall apply all procedures and criteria for each method of entry on a nondiscriminatory basis.

18. Defendant Local 542 shall admit at least one minority for every one non-minority through the following methods of entry:

New C Branch hires and new entrants to the Registrant Program. This ratio shall remain in effect until the racial composition of Local 542 and of its five districts reach the percentage-goals set forth in paragraph 16 and that percentage is maintained for 2 years; provided, however, once a particular district has attained its appropriate minority percentage and maintains it for two years, this one-for-one ratio shall no longer be applied in that district.

The mandatory one-for-one entry requirement shall not apply to Organization (the Union's organization of new employers) because of its unique characteristics. However, Local 542 shall make the maximum effort possible to meet the one-for-one entry requirement under Organization. The failure to meet the one-for-one requirement via Organization shall not relieve Local 542 of its overall obligation to admit one minority for every one non-minority until the percentage-goals set forth in paragraph 16 are met.

19. Any new methods of entry which Local 542 may develop and wish to utilize must first be submitted to Plaintiffs for their comment and thereafter to the Court for approval. The one-for-one entry requirement set forth in paragraph 16 may apply to any new method of entry if the Court deems its application to be appropriate.

20. In paragraph 27, the responsibilities of each defendant class employer with regard to the number of

hours to be worked by minority operating engineers are detailed. Under the circumstances described there, each contractor-employer is permitted to hire minorities not currently affiliated with Local 542 in order to reach its minority utilization goal. Minorities hired and employed in compliance with paragraph 27 shall be required to become affiliated with Local 542. Minorities entering the operating engineers industry through this direct entry method shall be counted towards the attainment of the minority composition goals for the union as a whole and for each of its five districts as set forth in paragraph 16.

21. (a) Defendant Local 542 shall develop and present to the Court for approval valid, job related criteria for admission to the union for each method of entry through which membership can be attained, including affiliation via the Registrant Program. Validation shall be, to the extent feasible, in accordance with the "Uniform Guidelines on Employee Selection Procedures" as promulgated by the Equal Employment Opportunity Commission on August 25, 1978, 43 Fed.Reg.No. 166, at 38290 *et seq.* The Plaintiffs shall have the opportunity to present their position on the legality and validity of any of these proposed criteria.

(b) If the Court approves the proposed union membership and registrant criteria, they may be put into effect; provided, however, that the approval of new membership and registrant criteria, if any, shall not relieve Local 542 of its obligations under paragraph 16 of this Decree.

22. Pending the development and approval of new membership requirements, Local 542 may continue to use its existing requirements for each of its present methods of entry.

23. All minority graduates of Operations Benjamin Franklin I and II who are not members of Local 542 as of the date of this decree shall be offered Registrant books unless good cause is shown for the failure to do so and such minority graduates shall be offered admis-

sion into the parent body of Local 542 after they have worked 1500 hours during their affiliation with Local 542. They may be charged an initiation fee only if they have not previously made such a payment. However, if a fee is required, deferred payments shall be permitted in an amount to be determined by the Magistrate.

24. All minority graduates of Operations Benjamin Franklin I and II who are not members of Local 542 as of the date of this decree shall be offered the opportunity for intensive training and retraining as operating engineers. Minority graduates of these programs who have attained union membership may take part in this training if they choose to do do. The training itself may take the form of comprehensive on-the-job training or participation in the Special Training Program set forth in paragraph 41 of this Decree, or both. All aspects and components of training shall be developed by the Magistrate with the assistance of the Advisory Committee. The costs of this program shall be borne by the Defendants.

25. Not all minority graduates of Operations Benjamin Franklin I and II who have not yet attained union membership are required to undergo the training identified in paragraph 24. Minorities in this group who are sufficiently skilled as operating engineers need not participate in training. The decision as to whether a particular graduate is sufficiently skilled is reserved to the Magistrate with the assistance of the Advisory Committee.

26. In order to remedy the past racial discrimination with respect to transfers in and out of C Branch, Local 542 shall personally notify all present and future C Branch minority members of their right to apply for and be transferred out of the C Branch and into the parent body of the Union. No more stringent requirements for transfer shall be imposed on present C Branch minorities than have been imposed by Local 542 in the past on whites.

In addition, Local 542 shall personally notify all present parent body minorities of their right to apply for transfer into the C Branch. No more stringent requirements for transfer in this regard shall be imposed on these minorities than have been imposed by Local 542 in the past on whites.

VI. EMPLOYER OBLIGATIONS

27. In order to achieve the minority utilization goals set forth in paragraph 12, each defendant contractor-employer shall hire minority operating engineers in the following manner.

(a) First, each contractor-employer shall hire and employ minority operating engineers who are or become members, apprentices, registrants or affiliates of Local 542 and who are referred by Local 542 through the hiring hall. If the contractor-employer has not met its minority utilization goals, it may request additional minority referrals.

(b) Second, each contractor-employer must thereafter, if it has not yet reached its minority utilization goal, and if it cannot obtain sufficient minority referrals from Local 542, hire and employ minority operating engineers who are not affiliated with defendant Local 542. Registrant books shall promptly be provided to these minorities by the Union. Thereafter, each such minority shall become eligible for parent body membership in accordance with the relevant terms of the collective bargaining agreement and the Union's by-laws. The wages, compensation and all terms and conditions of employment for this group of minorities are to be determined by the relevant collective bargaining agreement.

(c) Third, each contractor-employer must then, if it has not yet reached its minority utilization goal, hire, and employ minorities not currently skilled and not currently affiliated with defendant Local 542. On-the-job training and instruction shall be provided to this category of minorities so that they are able, to the maximum

extent feasible, to learn and become skilled in the operation of equipment used and the work performed by operating engineers. The Union shall promptly provide each minority person hired pursuant to this provision with a Registrant book. Thereafter, each such minority shall become eligible for parent body membership in accordance with the relevant terms of the collective bargaining agreement and the Union's by-laws. The wages, compensation and all terms and conditions of employment for this group of minorities shall be determined by the relevant collective bargaining agreement.

28. In meeting its responsibilities, as set forth in paragraph 27, no contractor-employer shall be required to hire, or continue the employment of, any minority if just cause exists not to hire, train or employ him. The phrase "just cause" as used herein shall be given the same meaning and interpretation as it is given in the collective bargaining agreement (see, *e. g.*, P-281-B. at 2. Article II, Section 2(c)). In addition, no contractor-employer shall be held liable for the non-attainment of its minority utilization goal because of a voluntary termination by a minority operating engineer that is without just cause, or because of the unavailability of a minority operating engineer due to illness, incarceration or the like. Furthermore, the refusal of a referral without just cause by a minority operating engineer on three consecutive occasions shall be a defense assertable by a contractor-employer to the non-attainment of its minority utilization goals.

29. The minority utilization goals set forth in paragraph 12 and the means for achieving them as set forth in paragraph 27 shall apply to each non-C Branch contractor-employer in each of Local 542's five districts. The Magistrate shall audit each employer's minority utilization of operating engineers on a quarterly basis.

The burden of proving a valid reason for not achieving the appropriate minority utilization percentage rests on each non-complying contractor-employer. In order to

successfully discharge its burden, each non-complying contractor-employer, if any, must prove that it utilized or attempted to utilize the means for achieving the appropriate minority utilization goal as set forth in paragraph 27. The Magistrate shall determine whether a non-complying contractor-employer has discharged its burden and what remedial action, if any, should be imposed in accordance with the procedures set forth in paragraph 44.

30. (a) Hiring for C Branch shall continue to be conducted directly by the defendant employers.

(b) Each C Branch employer shall have the responsibility of guaranteeing that all of its new C Branch employees are hired on a one minority for one non-minority basis until the percentage of minorities in its operating engineer labor force is at least equal to the percentage of minorities in the District(s) Local 542 in which it is located as set forth in paragraph 16.

(c) Except where justified by nondiscriminatory factors, each employer in each district shall employ minority and white C Branch employees for the same average number of hours per employee.

(d) Any allegations of noncompliance with the provisions of this paragraph shall be resolved according to the procedures set forth in paragraph 44.

VII. APPRENTICESHIP PROGRAM

31. Defendant employers and Local 542 shall continue to administer an apprenticeship program through the JATC.

32. Defendant JATC shall admit into its apprenticeship program at least one minority for every one non-minority apprentice in each new apprenticeship class. This ratio shall be followed until the racial composition of Local 542 as a whole and of its five districts reach the minority percentage goals set forth in paragraph 16; provided, however, once a particular district attains its

appropriate minority percentage, this one-for-one ratio shall no longer be applied in that district. The terms and provisions of this paragraph shall apply to any apprenticeship class beginning after the date of this decree.

33. JATC may continue to utilize the present JATC test and oral interview, and thereafter rank eligible applicants in order of their scores on that test and interview. Should JATC desire to adopt and utilize other or additional criteria and standards, it must submit these criteria and standards to plaintiffs for comment and subsequently to the Court for approval; provided, however, that no JATC class shall be cancelled or postponed pending the adoption and/or implementation of any additional criteria or standards; and provided further, that regardless of which standards and criteria are utilized, the one-for-one admission requirement, as set forth in paragraph 32, shall remain in effect until such time as the percentage goals set forth in paragraph 16 are met.

34. In order to meet the one-for-one ratio set forth in paragraph 32 and the percentage-goals set forth in paragraph 16, JATC shall affirmatively recruit minority applicants for the apprenticeship program in each of Local 542's five districts and JATC shall continue to use the recruitment, tutoring and counseling services of the Joint Apprenticeship Outreach Program and any other agency that is capable of assisting JATC in minority recruitment.

35. Any minority member of the apprenticeship program whose progress is unsatisfactory shall be notified by the JATC in writing of the problem and the reasons therefor. If he does not show adequate improvement within thirty (30) days after the initial notice of deficiency, he shall be notified in writing to appear before the JATC and shall be offered the opportunity to participate in a special remedial program. If adequate improvement does not occur within sixty (60) days after his requested appearance before the JATC, he may be discharged from the apprenticeship program. Any per-

son discharged from the apprenticeship program pursuant to this paragraph may appeal his discharge to the Magistrate within seven (7) days after he receives written notice of his discharge and his right to appeal.

36. Upon graduation from the apprenticeship program, an apprentice shall be accorded Group I journeyman status in Local 542 as provided by the collective bargaining agreement.

37. Prior to selecting the members of each apprentice class, the JATC shall take reasonable steps to publicize the class, including advertisements in the help-wanted sections of newspapers or periodicals oriented toward the minority community.

38. In order to remedy the past racial discrimination with respect to the position of JATC instructor, defendant JATC shall appoint one minority for each one non-minority to all future JATC instructor positions, and shall continue to apply that ratio until such time as 11.5 percent (the percentage of minorities in community in Local 542's jurisdiction) of all JATC instructor positions are held by minorities. The qualifications for JATC instructor shall in no respect be any more stringent than those previously applied by the JATC.

VIII. MASTER MECHANICS

39. In District I of Local 542, at least one out of every eight new master and assistant master mechanic appointments shall be to minority parent body members.

In Districts II, III, IV and V, minority parent body members shall be appointed to master and assistant master mechanic positions in a percentage equivalent to the minority representation in the community for those districts (i. e., 1.3% in District II; .7% in District III, 2.8% in District IV, and 12.4% in District V).

The requirements for the hiring of master and assistant mechanics shall be reassessed after two years.

40. The Defendants shall develop, adopt and implement non-discriminatory and job-related standards for the positions of master and assistant master mechanics. Once developed, these standards shall be submitted to the Court for approval, with prior submission to Plaintiffs for their comments, or objections, if any.

IX. RETRAINING AND UPGRADING

41. In light of the Court's findings of intentional discrimination against minority operating engineers with respect to referrals, hours worked, wages, and with respect to the exclusion of minorities from Operation Stepping Stone, the Defendants shall conduct a retraining and upgrading program, the purpose of which is to improve the skills, where necessary, of minority members and registrants of Local 542. All active minority members and registrants shall be personally notified of the program and personally offered an opportunity to participate. The program shall be developed by the Magistrate with the assistance of the Advisory Committee.

42. This training program shall not, however, be limited to training at a training site, but shall also include on-the-job training on new equipment or equipment currently in use in the operating engineers industry. The expenses of the program shall be borne by the Defendants.

X. RECORDKEEPING AND REPORTING

43. (a) During the life of this Decree each defendant shall maintain sufficient records to enable it to comply with the reporting requirements of this paragraph and to allow the Magistrate or the Court to determine the adequacy of its compliance with this Decree.

(b) To facilitate the compilation of data and the filing of reports, the defendants shall establish and maintain a Reporting Committee, which shall consist of one person designated by Local 542 and one person designated by the defendant employers.

(c) Each defendant employer shall submit to the Magistrate, the Reporting Committee, and a representative designated by plaintiffs a quarterly report setting forth sufficient information regarding operating engineer hours for the previous quarter and the year-to-date to permit a determination of whether the employer is in compliance with its obligations under paragraphs 27 and 30.

(d) Based on the reports submitted by employers pursuant to subparagraph (c), the Reporting Committee shall submit to the Magistrate, Local 542, and a representative designated by plaintiffs a quarterly report setting forth sufficient information regarding operating engineer hours for the previous quarter and the year-to-date to permit a determination of whether the overall hours goals set forth in paragraph 12 are being met.

(e) Local 542 shall submit to the Magistrate, the Reporting Committee, and a representative designated by plaintiffs a quarterly report setting forth sufficient information regarding union membership and additions thereto for the previous quarter and the year to date to permit a determination of whether Local 542 is in compliance with its obligations under paragraphs 14-26.

(f) The JATC shall submit to the Magistrate, the Reporting Committee, and a representative designated by plaintiffs a quarterly report setting forth sufficient information regarding the membership and operation of the apprentice program for the previous quarter and the year-to-date to permit a determination of whether the JATC is in compliance with its obligations under paragraphs 31-38.

(g) The parties shall attempt to agree on the form and the schedule for submission of the reports required by subparagraphs (c)-(f). Any matters as to which the parties cannot agree shall be submitted to the Magistrate.

XI. ALLEGATIONS OF NONCOMPLIANCE WITH GOALS

44. (a) In the event that at the end of any year, the reports filed pursuant to paragraph 43 indicate that any of the goals set forth in this Decree have not been met for that year, the parties shall meet and attempt to agree on the corrective action, if any, that should be undertaken. Any corrective action agreed upon by the parties shall be submitted to the Magistrate and shall be deemed to be approved unless the Magistrate rejects the parties' proposal within twenty-one (21) days of its submission.

(b) In the event that the parties are unable to agree, the plaintiffs shall so inform the Magistrate. After reviewing the positions of all parties and considering the burdens of proof imposed in paragraph 29, the Magistrate shall issue a ruling regarding the corrective action, if any, to be undertaken. Such corrective action, if ordered, may include an increase in the minority entry ratios into the parent body, C Branch, or the apprentice program; an increase in the rate of minority referrals as provided for in paragraph 16; or any other corrective action deemed appropriate. If necessary in the Magistrate's judgment to prevent future disparities, the Magistrate may also increase the minimum hours goals imposed under paragraph 12.

(c) The Magistrate may take corrective action on the basis of the quarterly reports upon notice to and consultation with the parties.

XII. STATUTORY REQUIREMENTS

45. This Court has determined that all of the obligations imposed upon defendants by this Decree are required for compliance with 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, that none will result in discrimination under those statutes, and that each is ordered

pursuant to this court's equitable powers under these statutes.

XIII. NOTICE

46. Each member of the plaintiff and the defendant classes shall be sent, by certified mail, return receipt, requested, a copy of this Judgment and Decree. This mailing shall also include a notice summarizing this Decree as well as this court's opinion liability which was filed and impounded on November 30, 1978 and released from impoundment on January 2, 1979. Counsel shall agree on the wording of this notice within 30 days from the date of this decree. In the event the parties are unable to agree within the 30-day period, any unresolved matters shall be submitted to the Magistrate. The costs of notification shall be borne by the defendants.

XIV. POSTING AND PUBLICITY

47. Defendants shall post conspicuously copies of this Judgment and Decree and the Notice agreed to under Paragraph 46 in a place and manner designed to ensure that those affected by it have the maximum opportunity to familiarize themselves with its contents. In addition, the parties shall agree on a program to publicize the opportunities afforded by the terms of this Decree, and the procedures available for taking advantage of such opportunities. The text of all materials used for this publicity shall be furnished in advance to the plaintiffs and the Magistrate. If the parties cannot reach agreement with respect to the publicity program, the matter shall be submitted to the Magistrate.

XV. ATTORNEYS' FEES AND COSTS

48. Individual and class plaintiffs and plaintiff Commonwealth of Pennsylvania, as prevailing parties, are entitled to a reasonable award of attorneys' fees and costs. Plaintiff's counsel are therefore directed to submit to the defendants and file with the Court an appropriate motion in this regard within forty five (45) days of the date of this Judgment and Decree.

XVI. RETENTION OF JURISDICTION

49. This Decree and all its provisions except for paragraphs 5-8 shall terminate on March 31, 1984 unless, prior to that date, good cause is shown for an extension of any provisions of the Decree or for their earlier termination.

50. This Court shall retain continuing jurisdiction over this action to ensure compliance with the terms and provisions of this Judgment and Decree. That jurisdiction shall terminate, either upon this Court's own motion, or upon motion of any party, at such time as the Court concludes that the rights of plaintiffs have been accorded and satisfied by the defendant.

ORDER

AND NOW, this 7th day of November, 1979, it is ORDERED that this Court's Order of August 8, 1979 impounding the Judgment and Decree of August 8, 1979 be vacated and the Clerk of the Court is directed to make available at the same time the Judgment and Decree of August 8, 1979 and the Opinion of November 7th, 1979.

BY THE COURT:

/s/ A. Leon Higginbotham
Circuit Judge *

*United States Court of Appeals for the Third Circuit, Sitting by Designation

POST DECREE ORDER #2

AND NOW, TO WIT, this 25th day of March, 1980, the following represents the Order of the Court resulting from the Post-Decree Hearing #1 held on March 17, 1980. To the extent that any dates or statements contained in this Order are inconsistent with anything stated at the time of the hearing, this Order shall control. IT IS ORDERED as follows:

1. The motion of the plaintiffs to amend the Judgment and Decree of August 8, 1979, is hereby *denied without prejudice.*

2. The defendants Contractor's Association and Glasgow Industries shall file, on or befort *March 28, 1980,* a formal motion to amend the Judgment and Decree, with a proposed form of Order setting forth their proposal identified as Exhibit A to their response to the plaintiff's motion to amend. Upon receipt of the motion to amend, the Court will enter an Order granting that motion.

3. Defendant Local 542's motion to amend or alter the Judgment and Decree is hereby *denied.*

4. The parties shall file, on or before *April 16, 1980,* a joint proposed Order to amend ¶ 27 of the Judgment and Decree, which shall be premised upon the compromise considerations and guidelines stated by the Court at the March 17, 1980, hearing. In the tvent the parties are unable to agree on such an Order, separate motions to amend shall be filed on or before *April 16, 1980,* together with the precise objections of each party to the other parties' motion to amend.

5. The Court hereby *appoints Frank W. Jenkins, Esquire, to serve as Master,* pursuant to Fed.R.Civ.P. 53, during the pendency of the life of the Judgment and Decree with all the full powers and limitations set forth under ¶¶ 10, 11, 15, 24, 25, 29, 41, 43 and 44 of the Judgment and Decree or as may be hereafter determined and ordered by the Court.

6. The Master shall file, on or before *March 28, 1980*, a letter of acceptance of such designation which shall, in addition to expressing acceptance, set forth the mailing address to which all communications by the Court or the parties shall be addressed. Communications to the Master at this designated address shall constitute adequate notice to the Master under any terms of any requirement or Order by the Court.

7. The parties shall file, on or before *March 24, 1980*, a joint proposed form of Notice, as required under ¶¶ 46 and 47 of the Judgment and Decree, along with recommendations as to the manner and time of notification.

8. The parties shall each file, on or before *April 16, 1980*, a legal memorandum addressing the sole legal issue of whether the cost for sending the above Notice to all members of the plaintiff and defendant classes should be assessed only against the named party defendants in this action or should be jointly shared by the non-party defendant employers, or otherwise.

9. Defendant Local 542 and the plaintiff shall file, on or before *March 27, 1980*, a joint proposed form of Special Notice that will be sent to all C Branch and present parent-body minority members concerning their rights under ¶ 26 of the Judgment and Decree. Recommendations as to the manner and time of notification shall also be included in the proposal of counsel. If the parties are unable to agree on a joint form of Notice, separate proposed forms of Notice shall be filed on or before *March 27, 1980*, together with the objections of each party to the other forms of Notice filed.

10. The parties shall file, on or before *April 16, 1980*, a proposed recommended program for the publicizing of the rights and opportunities available under the Judgment and Decree to minority group members, and the procedures by which those members may take advantage of the opportunities afforded under the Judgment and Decree, as required under ¶ 47 of the Judgment and Decree.

11. Defendant Local 542 and the plaintiffs shall file, on or before *March 24, 1980*, a joint proposed Notice letter for the Court's approval that will be sent to all graduates of the Operation Benjamin Franklin I and II training programs who are affected by ¶ 23 of the Judgment and Decree. Such letter shall set forth the rights and opportunities available to those graduates under the Judgment and Decree. If the parties are unable to agree on a joint form of Notice, separate proposed forms of Notice shall be filed with the Court on or before *March 24, 1980*, together with the precise objections of each party to the other forms of Notice filed.

12. The parties shall each file, on or before *April 16, 1980*, a legal memorandum addressing the *sole* legal issue of whether the costs incident to the services of the Court-appointed Master in this action should be borne solely by the named party defendants or jointly shared by the non-party defendant employers, or otherwise.

13. The joint oral motion of the parties to amend ¶ 11 of the Judgment and Decree, increasing the numbers of members of the Advisory Committee from six to eight members, with four persons representing the plaintiffs and four persons representing the defendants, is *granted*, and ¶ 11 of the Judgment and Decree is hereby *amended* accordingly.

14. The parties shall file, on or before *March 28, 1980*, a letter of appointment stating the names and mailing addresses of the members of the Advisory Committee selected by the parties.

15. The Advisory Committee shall conduct an initial organizational meeting on or before *April 7, 1980*. At the time of the meeting, the Committee shall select a chairperson and vice-chairperson. Furthermore, at the time of the organizational meeting, the Advisory Committee shall begin to formulate a proposed training and retraining program, including procedures for the notification of that program to minority group members, as

required under ¶¶ 24 and 41 of the Judgment and Decree. Following the organizational meeting, the chairperson shall cause to be filed a memorandum setting forth a brief summary of the results of the organizational meeting along with the names of persons designated as chairperson and vice-chairperson of the Advisory Committee, subcommittee chairpersons, if any, or any other special designations. The mailing address to which notices by the Court, parties or others shall be sent should also be included in the memorandum and shall be deemed the address of record of the Advisory Committee. The Court shall file, prior to the organizational meeting, a separate Order specifying the further requirements and limited functions to which the Committee shall strictly adhere.

16. The parties shall file, on or before *April 16, 1980*, a joint plan, or alternative plans, with a precise description of objections if there is disagreement, for the form and schedule for submission of the various reports required under ¶ 43(c-f) of the Judgment and Decree.

17. The defendants shall file, on or before *March 27, 1980*, a letter of appointment setting forth the names and mailing addresses of the two persons who shall comprise the Reporting Committee.

18. Any future changes in the personnel composition or organizational designations of either the Advisory or Reporting Committees shall be made only upon the advance consent of the Court, following submission of any proposed change to the Master, who shall provide his recommendations to the Court.

19. Defendant Local 542 shall file, on or before *April 16, 1980*, a status report detailing the discussions and proposed suggestions to date concerning the revised job-related criteria for admission to Local 542 for each method of entry, as required under ¶ 21(a) of the Judgment and Decree.

20. The parties shall file, on or before *March 27, 1980*, a joint proposed form of notice of current entry criteria to Local 542 for each method of entry. Such criteria shall remain in force in the interim period pending adoption of new criteria, as stated under ¶ 22 of the Judgment and Decree. If the parties are unable to jointly agree on the form of notice, separate forms of notice shall be submited by each party on or before *March 27, 1980*, with a precise description of objections to the other forms of notice filed.

21. Defendant Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania and Delaware ("JATC") shall file, on or before *March 31, 1980*, a status report detailing the timetable for the selection of the new JATC class; JATC shall also file the proposed program to date concerning the method of publication for advising minority group members of the formation of the new JATC class and the procedures available for applying for entry to the new JATC class, as required under ¶ 37 of the Judgment and Decree.

22. The defendants shall file, on or before *April 16, 1980*, a status report detailing the proposed suggestions to date concerning the formulation of revised non-discriminatory and job-related standards for the appointment of master and assistant master mechanics, as required under ¶ 40 of the Judgment ad Decree.

23. The motion of defendant JATC for approval of interim selection procedures is hereby *denied as being moot.*

24. The motion of defendant Local 542 for approval of implementation of the Decree, to the extent that it is inconsistent with this Court's Order, is hereby *denied.*

25. On or before *March 28, 1980*, each attorney intending to appear as attorney of record representing a particular party shall file with the Clerk of the Court a *current* entry of appearance, and those attorneys shall be deemed counsel of record for future purposes of all

notices, Orders and other communications issued by the Clerk of the Court or the Court. Although the concept of lead counsel was spoken to at the hearing on March 17, 1980, the Court recommends that that procedural issue be deferred until the particular need arises for such designations.

26. In the future, all communications from third parties to the Court or the parties concerning the implementation or subject matter of the Judgment and Decree, when those matters are ones that cannot or should not be determined by the parties, shall be forwarded by the parties or by the Court, in its own discretion, to the Master for whatever disposition is required under the Court's grant of authority.

/s/ Louis C. Bechtle
LOUIS C. BECHTLE
Judge

POST DECREE ORDER #3

AND NOW, TO WIT, this 26th day of March, 1980, IT IS ORDERED as follows:

1. The motion of the individually named and class plaintiffs for an extension of the life of the Judgment and Decree (Document #814) is hereby *granted*, with ¶ 3 of the August 8, 1979, Judgment and Decree to be *stricken* and the following language to be *substituted* therefor:

> 3. The Judgment and Decree shall, unless otherwise ordered by the Court, be extended to cover and include the following five-year period:
>
> Year 1: April 1, 1980 to March 31, 1981
> Year 2: April 1, 1981 to March 31, 1982
> Year 3: April 1, 1982 to March 31, 1983
> Year 4: April 1, 1983 to March 31, 1984
> Year 5: April 1, 1984 to March 31, 1985

/s/ Louis C. Bechtle
LOUIS C. BECHTLE
Judge

POST DECREE ORDER #10

AND NOW, TO WIT, this 29th day of May, 1980, IT IS ORDERED as follows:

1. This Order concerns the imposition and allocation of certain sums that will be required to be paid in connection with the implementation of the provisions of the Court's Decrees heretofore and hereafter entered. In order to be clear in respect to what is intended to be covered by this Order, it is necessary to briefly review the various types of liability that must be considered. They are as follows:

(A) *Damages:* By this term, the Court refers to sums of money or other satisfaction of a financial obligation that would inure directly to the plaintiff class or an eligible class member and which would be payable directly to the plaintiff class or an eligible class member.

(B) *Costs:* By this term, the Court refers to sums of money or other satisfaction of a financial obligation incurred by reason of such sum or obligation being determined by the Court to be necessary in order to implement the terms of any feature of the injunctive decree heretofore or hereafter entered by the Court, *provided however*, this item shall not include counsel fees or any amounts claimed by counsel on account of counsel's services, nor will this include any sums required by the Court to be paid as a direct consequence of a civil or criminal contempt arising under any of the Court's Orders heretofore or hereafter entered.

(C) *Counsel fees and costs:* By this term, the Court refers to sums of money or other satisfaction of a financial obligation approved by the Court for counsel fees or costs incurred by counsel in rendering legal services.

(D) *Other liability:* Sums or other satisfaction of a financial obligation not included in (A), (B) or (C) above.

2. This Order only concerns the "Costs" identified in paragraph 1(B) above. These are deemed by the

Court to be necessary for the implementation of the injunctive aspects of the litigation and shall, in the manner hereinafter provided for, be borne solely by the following named party-defendants in the manner hereinafter specified: Local 542; JATC; Contractors' Association; United Contractors' Association; General Building Contractors' Association; and, Glasgow, Inc.

3. The costs to be borne by the above-named defendants, being those that the Court considers to be related to the injunctive aspects of this litigation at this time, shall include: (1) cost of the preparation and publication of notices to plaintiff- and defendant-class members under ¶ 46 of the Judgment and Decree; (2) costs incurred by the Reporting Committee and approved by the Court; (3) costs incurred by the Advisory Committee and approved by the Court; (4) costs incurred in noticing and publicizing the Judgment and Decree under ¶ 47 and approved by the Court; (5) costs of the Master, including his fees, expenses and costs as approved by the Court; (6) costs incurred in the development of the retraining and upgrading programs under ¶¶ 41 and 42 and approved by the Court; and, (7) such other costs as the Court shall hereafter identify as those to be paid as being related to the injunctive aspects of this litigation.

4. This Order is not intended to expressly or by implication affect any right any party has to seek contribution or indemnity for any sums required to be paid by reason of this Order, from any person or other party, provided any such claim is otherwise in accordance with law and not contrary to the provisions of this Court's Orders or decrees, including this Order.

5. Upon consideration of the presentations of the parties and a review of the record in this case applicable to the apportionment of costs covered by this Order, the Court in its discretion, pursuant to Fed.R.Civ.P. 54 (d), has made what it believes to be an equitable allocation among the liable parties. It will be the primary responsibility for each named party-defendant to pay

the sums allocated by the Court in the percentage amounts hereinafter set forth, at such time as the Court shall determine by separate Order; *Provided* however, if the Court determines that the fulfillment of the requirements and purposes of the Decree are being unduly delayed, frustrated or interfered with by reason of the failure, or inability for any reason, of any party to pay its allocated share, the Court shall consider the liability of all liable parties hereunder to be joint and several.

6. The percentage allocation of the "Costs" required to be paid under this Order by the named party-defendants shall be as follows:

(A) Local 542—40%
(B) JATC—25%
(C) Contractors' Association—10%
(D) United Contractors' Association—10%
(E) General Building Contractors' Association—10%
(F) Glasgow, Inc.—5%

7. The Master is by this Order directed to file with the Court within *twenty (20) days* of the date of this Order a budget setting forth an itemized list of all sums estimated to become due and payable during the next 120 days, after which the Court will enter a payment Order setting forth the precise amounts to be paid by each liable party. The Master is also directed to open a special account for the receipt and disbursement of such sums.

8. All disbursements from the Master's account shall be made by the Master in such sums as the Court shall determine, upon the Master's certificate, are necessary to fulfill the requirements of the Decree.

9. A legal memorandum setting forth further reasons and authority in support of this Order will be filed in due course.

/s/ Louis C. Bechtle
LOUIS C. BECHTLE
Judge

POST DECREE ORDER #13

AND NOW, TO WIT, this 10th day of June, 1980, IT IS ORDERED as follows:

1. The Court has received from the Master a preliminary interim budget which sets forth an estimate of the costs expected to be incurred as of July 1, 1980, in respect to the injunctive aspects of this litigation, including: fees and expenses of the Master; costs of publication of legal notice advertisements; the use of telephone answering services in conjunction with the publicity program required under ¶ 47 of the Judgment and Decree; and, other costs directly associated with the injunctive aspects of this litigation. The total amount of these estimated interim costs is $21,500. That amount is hereby *approved* by the Court and is found to be directly related to the injunctive aspects of this litigation.

2. The parties, in accordance with Post Decree Order #10, shall pay the following amounts to the Clerk of the Court on or before June 17, 1980:

(A) Local 542—$8,600 (40%)
(B) JATC—$5,375 (25%)
(C) Contractors' Association—$2,150 (10%)
(D) United Contractors' Association—$2,150 (10%)
(E) General Building Contractors' Association—$2,150 (10%)
(F) Glasgow, Inc.—$1,075 (5%)

3. The Clerk of the Court, upon receipt of the above funds, is *directed* to deposit the same, as they are received, into the special account established by the Master from which to make disbursements related to the injunctive aspects of this litigation.

4. Upon receipt of the funds into the special account, the Master is hereby *authorized* to withdraw and disburse such sums as become necessary from time to time in conjunction with the costs associated with the in-

junctive aspects of this litigation. The Master shall account to the Court before the 10th day of each month in respect to all matters affecting the special account for the preceding month.

/s/ Louis C. Bechtle
LOUIS C. BECHTLE
Judge

POST DECREE ORDER #14

AND NOW, TO WIT, this 16th day of June, 1980, IT IS ORDERED as follows:

1. The Court's Post Decree Order #12 is hereby *amended* as follows:

(A) The publication date for the placing of the first Legal Notice advertisements in the district-wide newspapers is hereby *extended* from June 18, 1980, until *June 25, 1980*, and shall continue from that date for four consecutive weeks in the same manner and form outlined in Post Decree Order #12.

(B) As a result, the commencement date for the use of commercial telephone answering services shall also be *extended* from June 18, 1980, until *June 25, 1980*, and shall continue for five consecutive weeks from that date in the same manner and form outlined in Post Decree Order #12.

(C) The list of newspapers for District I shall also include the newspaper La Actualidad, in which publication of the Legal Notice advertisement shall take place on June 26; July 3, 10 and 17.

2. The Court has been informed by the Master that an additional interim estimated amount of $20,000 is required in order to pay for the publication of Legal Notice advertisements in the district-wide newspapers, as outlined in Post Decree Order #12, as part of the publicity program required under ¶ 47 of the Judgment and

Decree. That amount is hereby *approved* by the Court and is found to be directly related to the injunctive aspects of this litigation. The Master is *directed* to file with the Court on or before *June 20, 1980,* a detailed budget as to the exact cost of publication of the Legal Notice advertisements in the various district-wide newspapers.

3. The parties, in accordance with Post Decree Order #10, shall pay to the Clerk of the Court *on or before 1:00 p.m. on June 20, 1980,* in addition to those amounts already required to be paid by Post Decree Order #13, the following amounts:

(A) Local 542—$8,000 (40%)
(B) JATC—$5,000 (25%)
(C) Contractors' Association—$2,000 (10%)
(D) United Contractors' Association—$2,000 (10%)
(E) General Building Contractors' Association—$2,000 (10%)
(F) Glasgow, Inc.—$1,000 (5%)

4. The Clerk of the Court, upon receipt of the above funds, is *directed* to promptly deposit the same, as they are received, into the special account established by the Master from which to make disbursements related to the injunctive aspects of this litigation.

IT IS FURTHER ORDERED that, upon careful consideration of the arguments raised in the briefs of counsel, the motion of defendants Contractor Associations and Glasgow, Inc., for reargument and reconsideration of Post Decree Order #10, concerning the issue of the allocation of costs among the parties, is hereby *denied.*

/s/ Louis C. Bechtle
LOUIS C. BECHTLE
J.

POST DECREE ORDER #15

AND NOW, TO WIT, this 27th day of June, 1980, following hearing in open court, IT IS ORDERED as follows:

1. The motion of the plaintiffs, filed May 23, 1980, to amend ¶ 27 of the Judgment and Decree is hereby *denied without prejudice.*

2. The motion of defendant Local 542, filed May 23, 1980, to amend ¶ 27 of the Judgment and Decree is hereby *granted in part* and *denied in part.* It is *granted* insofar as ¶ 27 of the Court's August 8, 1979, Judgment and Decree is hereby *amended* to read as follows, with the following underscored language to constitute the amended language:

> 27. In order to achieve the minority *hour*-utilization *percentage* goals set forth in ¶ 12, each defendant contractor-employer shall hire minority operating engineers in the following manner:
>
> (a) First, each contractor-employer shall hire and employ minority operating engineers who are or become members, apprentices, registrants or affiliates of Local 542 and who are referred by Local 542 through its hiring hall. If any particular contractor-employer *is not separately meeting the applicable minority hour-utilization precentage goals set forth in ¶ 12 in its own aggregate work force in the district (e.g., 12% for the first year in District I), it may request additional minority referrals from the Local 542 hiring hall.*
>
> (b) *Second, if the current monthly hourly reports of responding contractor-employers in the reporting district, as officially compiled and certified by the Reporting Committee, show: (i) that the minority hour-utilization percentage goals of ¶ 12 have been met for the Decree year-to-last-reporting-date on a district-wide basis by all reporting contractors in that district as a whole; and*

(ii) that for the year-to-last-reporting-date 50% or more of the reporting individual contractor-employers in the district have separately met or exceeded the minority hour-utilization percentage goals of ¶ 12 in their own work forces in that district, then, and only then, may the contractor-employer who is not separately meeting the minority hour-utilization percentage goals in its own aggregate work force in that district withdraw its request for additional minority operating engineer referrals from the Local 542 hiring hall. However, such contractor-employer may only make such a withdrawal during such time as both conditions (i) and (ii) above are being met from the Decree year-to-last-reporting-date. Any contractor-employer who is not separately meeting the minority hour-utilization percentage goals of ¶ 12 Decree year-to-last-reporting date in its own aggregate work force in the district may insist upon additional minority referrals from Local 542, regardless of whether the district as a whole and/or 50% of the contractor-employers have met or exceeded the minority hour-utilization precentage goals of ¶ 12. Any contractor-employer may only insist upon additional minority referrals until such time as Reporting Committee certified information indicates that the contractor-employer has separately achieved the minority hour-utilization percentage goals under ¶ 12 in its own aggregate work force in the district in question. Once that individual minority percentage goal is certified by the Reporting Committee to have been achieved Decree year-to-last-reporting-date, the contractor-employer may not request additional minority referrals until such time as certified by the Reporting Committee, as its own individual minority hour-utilization percentage in its own work force is less than the percentage goals set forth in ¶ 12 of the Judgment and Decree.

(c) *Third, if: (i) the contractor-employer has not withdrawn its request for additional minority referrals as provided above: (ii) if it has not yet individually reached in its own aggregate work force in the district the minority hour-utilization percentage goals set forth in ¶ 12; and, (iii) if it cannot obtain sufficient minority referrals from the Local 542 hiring hall, then, to enable it to separately meet the minority hour-utilization percentage goals in its own aggregate work force in the district, the contractor-employer is permitted to hire and employ skilled minority operating engineers who are not currently affiliated with defendant Local 542.* Registrant books shall promptly be provided to these minorities by the Union. Thereafter, each such minority shall become eligible for parent body membership in accordance with the relevant terms of the collective bargaining agreement and the Union's by-laws. The wages, compensation and all terms and conditions of employment for this group of minorities are to be determined by the relevant collective bargaining agreement.

(d) *If all the conditions set forth in subparagraph (c) above have been satisfied, and the contractor-employer still has not been able to separately satisfy the minority hour-utilization percentage goals set forth in ¶ 12 in its own aggregate work force in the district, then the contractor-employer is permitted to hire and employ minorities who are not currently skilled as operating engineers, and not currently affiliated with Local 542.* On-the-job training and instruction shall be provided to this category of minorities so that they are able, to the maximum extent feasible, to learn and become skilled in the operation of equipment used and the work performed by operating engineers. The Union shall promptly provide each minority person hired pursuant to this provision with a Registrant book. Thereafter, each

such minority shall become eligible for parent body membership in accordance with the relevant terms of the collective bargaining agreement and the Union's by-laws. The wages, compensation and all terms and conditions of employment for this group of minorities shall be determined by the relevant collective bargaining agreement.

(e) *Notwithstanding any other provision of this Judgment and Decree, no defendant contractor-employer shall be held liable for the non-attainment of the applicable minority hour-utilization percentage goals set forth in ¶ 12 if: (i) the minority utilization goal has been met for the Decree year-to-last-reporting date on a district-wide basis by all contractor-employers as a whole; and, (ii) for the Decree year-to-last-reporting-date 50% or more of the contractor-employers in the district have been certified to have met or exceeded the minority hour-utilization percentage goals in their own work forces in the district.*

(f) *At the conclusion of each Decree year, if either condition (i) or (ii) set forth in subparagraph (e) above has not been satisfied, then, except for the exemptions from liability specified below, all defendant contractor-employers who performed work in the non-complying district for any part of the Decree year shall be held jointly and severally liable for the non-attainment of the applicable minority hour-utilization percentage goals set forth in ¶ 12 of the Judgment and Decree. A contractor-employer shall be deemed exempt from any liability for non-attainment of the applicable minority hour-utilization percentage goals in a district only if: (i) it has separately attained the minority hour-utilization percentage goals of ¶ 12 in its own aggregate work force in the district in question for the Decree year, as indicated by certified information of the Reporting Committee:*

or, (ii) good cause can be shown to justify that party's noncompliance.

(g) *No defendant contractor-employer shall be held in violation of this Judgment and Decree on account of any withdrawal of a request for additional minority referrals, or failure to individually achieve the minority hour-utilization percentage goals at the end of the Decree year, which were made upon proven reliance of official Decree year-to-last-reporting-date information provided to it by the Reporting Committee, the Master or the Court concerning district-wide compliance, individual compliance by other contractor-employers or its own individual compliance. A contractor-employer shall not be excused from liability for noncompliance if it relies upon compliance information from any other source except the above.*

(h) *The knowing or willful submission of erroneous data by any party or person to the Reporting Committee shall be deemed to be disobedience to the Court's Decree and shall subject the responsible party to the contempt power of the Court.*

(i) *Any questions, disputes or problems between or by any party concerning any aspect of the provisions of this paragraph shall be presented in the first instance, after notice to the other party, to the Master for his prompt determination and decision, in conformance with the other provisions of the Judgment and Decree.*

(j) *The Master is specifically empowered to monitor compliance with the provisions of this paragraph and shall take any remedial action necessary to implement and insure strict compliance with the terms and provisions of this paragraph and in general, this Decree.*

3. On or after January 1, 1981, the Court will reexamine this amended ¶ 27 to determine if any further

amendments should be considered in order to further the purposes and goals of the Decree.

4. To be consistent with the amended language of ¶ 27, the Court hereby *amends* ¶ 43(c), (d), (e) and (f) of the Augunst 8, 1979, Judgment and Decree to read as follows, with the following underscored language to constitute the amended language:

> (c) Each defendant employer shall submit to the *Master*, the Reporting Committee and a representative designated by plaintiffs a *monthly* report setting forth sufficient information regarding operating engineer hours for the previous *month* and the year-to-date to permit a determination of whether the employer is in compliance with its obligations under ¶¶ 27 and 30.
>
> (d) Based on the reports submitted by employers pursuant to subparagraph (c), the Reporting Commitee shall submit to the *Master*, Local 542 and a representative designated by plaintiffs a *monthly* report setting forth sufficient information regarding operating engineer hours for the previous *month* and the year-to-date to permit a determination of whether the overall hours goals set forth in ¶ 12 are being met.
>
> (e) Local 542 shall submit to the *Master*, the Reporting Committee and a representative designated by plaintiff: a *monthly* report setting forth sufficient information regarding union membership and addition thereto for the previous *month* and the year-to-date to permit a determination of whether Local 542 is in compliance with its obligations under ¶¶ 14-26.

5. The reporting system and forms submitted by the parties in a report to the Court pursuant to ¶ 43 of the Judgment and Decree, filed April 16, 1980, are hereby *approved*, but only insofar as the parties shall jointly revise the submitted forms and procedures to include the earnings data required under Post Decree Order #11,

and make such other changes as are thought necessary in light of the Court's present amendment to ¶ 27. Such revisions *shall be submitted* to the Clerk of the Court on or before *July 14, 1980*, for the Court's approval.

6. The parties *shall jointly report* to the Court on or before *July 14, 1980*, as to the timetable for the distribution of the revised forms, together with a statement of the proposed instructions which shall be included with the forms sent to each contractor-employer.

7. The parties shall also *submit* to the Clerk of the Court on or before *July 14, 1980*, a joint report setting forth the procedures and methods to be followed by the Reporting Committee in collecting, compiling, tabulating and summarizing the monthly reports of hours and wages submitted by responding contractor-employers. The use of a computerized data service for this purpose is suggested to the parties by the Court as a possible means to assure an effective Committee result. The joint report should also detail the method by which inquiring contractor-employers may obtain prompt and reliable official certified information from the Reporting Committee concerning minority hour-utilization percentage goal compliance in their district for purposes of compliance with amended ¶ 27 of the Judgment and Decree.

8. The parties *shall file* with the Clerk of the Court on or before *July 14, 1980*, a jointly revised summary notice for the Court's approval, that will be sent to plaintiff- and defendant-class members pursuant to ¶ 46 of the Judgment and Decree. The revisions should incorporate the amendments to the August 8, 1979, Judgment and Decree as set forth in Post Decree Orders 3, 4, 6, 11 and *this* Order. The parties should also jointly file a proposed report for the Court's approval detailing: (a) the mechanical procedures by which notice packages shall be prepared, compiled, mailed and recorded in respect to addressee plaintiff- and defendant-class members; (b) the timetable for the mailing of the notice packages; and (c) a projected budget as to the costs that will be in-

curred in the preparation and mailing of the notice packages.

9. The parties shall also jointly compile current lists of ascertainable defendant- and plaintiff-class members for notice purposes, with their last known mailing addresses. Disputes or questions concerning the compilation and content of these lists shall be promptly submitted in the first instance to the Master for his resolution.

10. The defendant Local 542 *shall file* with the Clerk of the Court on or before *July 23, 1980*, for the Court's approval, the names of those experts to be utilized for purposes of validating the entry criteria to Local 542 and criteria for the selection of master and assistant master mechanics as required under ¶¶21 (a) and 40 of the Judgment and Decree. The Local should also file a report setting forth the exact method and procedure by which expert validation shall take place and a timetable for the completion of that validation process. Plaintiffs are given leave by the Court to respond to the names of those persons proposed as experts, and leave is given for plaintiffs to file with the Clerk of the Court on or before *July 30, 1980*, alternative or additional names of experts for purposes of validation, together with suggestions for the method and procedure to be employed to achieve expert validation. The Court shall then determine which expert or experts will be approved to undertake the validation process and the method, procedures and timetable to be employed to achieve such validation.

11. The following additional language, in BOLD type, shall be added by the Master after the last paragraph of the final two Legal Notice advertisements to be placed in each of the newspapers in the districts, as set forth in Post Decree Order #12 (Appendix A):

> In order for the Court to determine at the present time the extent to which *you* may be eligible for

benefits and opportunities under the Court's Decree, you *must* call the above telephone number *before 5:00 p.m., Tuesday, July 29, 1980.*

12. The Court hereby *approves* the questionnaire for Phase II of the publicity program submitted by the parties in their report to the Court filed pursuant to Post Decree Order #12 at ¶ 8(L). However, the Court *directs* that the questionnaire also contain a signature line whereby the person completing the questionnaire must swear as to its truthfulness, to the best of his or her knowledge. The Master is hereby *authorized* to make the above addition to the questionnaires.

13. The Court finds, upon examination of the qualifications of and recommendation by the Master, that Frank Ebert shall be and is hereby *approved* to be appointed, pursuant to the Court's power under Fed.R. Civ.P. 53, to serve as an expert job evaluation monitor for the Benjamin Franklin I and II graduates evaluation program pursuant to ¶ 25 of the Judgment and Decree; as an expert monitor for the training and upgrading program pursuant to ¶¶ 41 and 42; and, whatever further duties the Court subsequently directs.

14. The Court finds that a fair and reasonable rate of compensation for Mr. Ebert in respect to services rendered shall be $150 per day, to be pro-rated on a time-actually-worked basis and based on an eight-hour working day. Mr. Ebert shall submit to the Master, by the end of each month worked, a bill for his services for that month. The Master shall include that amount in his monthly budget to be approved by the Court.

15. Evaluation of Benjamin Franklin I and II graduates shall be accomplished by a committee ("Evaluation Committee") of three persons, consisting of Mr. Ebert, one representative selected by plaintiffs and one representative selected by defendants. Mr. Ebert shall serve as the Chairman of this three-person Evaluation Committee. A majority vote of a quorum will be required for

Committee action. Mr. Ebert shall have the power to break any tie vote. A quorum shall exist whenever the Chairman is present.

16. The plaintiff and defendant representatives of the Evaluation Committee are permitted to file with the Master a bill for their costs actually incurred for their work on the Evaluation Committee. Such costs may include an amount measured by their usual straight-time wage rate for time spent performing this Committee's work during regular working hours, including travel time spent going to and from the evaluation site, *provided* that no compensation will be furnished if the Committee members are being concurrently paid by their employers for the same time spent doing Committee work. The amount of costs per day per member, in any event, shall not exceed $150.

17. The work of the Evaluation Committee shall not exceed six full working days, except upon prior approval of the Court.

18. Upon recommendation of the Master, graduates of the Benjamin Franklin I and II programs, who fully participate in and complete the evaluation program, shall each be compensated at a rate not to exceed $50 per day, pro-rated on the basis of an eight-hour day, for actual time spent during regular working hours participating in the Benjamin Franklin evaluation program, *provided* that no compensation will be furnished if the participating graduates are being concurrently paid by their employers for the same time spent in the evaluation program. Graduates participating and desiring reimbursement shall submit to the Master, within five (5) days after the completion of their evaluation, a statement of earnings due, based on the time spent in the program *and* a sworn certification that they have not nor will not be paid by any employer for the time spent participating in the evaluation program.

19. The Master has submitted to the Court: (A) a statement of his fees and expenses from March 6, 1980, to May 22, 1980, attached as Appendix A hereto; and (2) an estimated budget for sums estimated due or to become due from June 1 until September 30, 1980, attached hereto as Appendix B. The Court hereby *adopts and approves* both statements of costs and hourly rates which are found to be directly related to the injunctive aspects of this litigation. The Court *directs* the Master to submit appropriate forms of Order to the Court directing the Clerk of the Court to disburse funds in the registry of the Court, after which the Master shall make necessary payments in accordance with the approved budget.

/s/ Louis C. Bechtle
LOUIS C. BECHTLE
Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 80-2073/74 & 80-2161/62/63

COMMONWEALTH OF PENNSYLVANIA [*et al.*]

v.

LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS [*et al.*]

Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. Civil No. 71-2698)

Present: SEITZ, *Chief Judge* and ALDISERT, GIBBONS, HUNTER, WEIS, and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on February 24, 1981 and later reargued en banc on May 12, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court entered August 8, 1979, November 7, 1979, March 25, 1980, March 26, 1980, May 30, 1980, June 10, 1980, June 17, 1980 and June 27, 1980, be, and the same are hereby affirmed, all in accordance with the opinion of this Court. Costs taxed against appellants.

Attest

/s/ Sally Mrvos
Clerk

May 19, 1981

APPENDIX G

[Appeal by Local Union 542 and JATC]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2159/60

COMMONWEALTH OF PENNSYLVANIA [*et al.*]

v.

LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, [*et al.*]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 71-2698)

Argued February 24, 1981

Before: WEIS and GARTH, *Circuit Judges*, and MILLER, *Judge, Court of Customs and Patent Appeals*

Reargued May 12, 1981 In Banc

Before: SEITZ, *Chief Judge*, ALDISERT, GIBBONS, HUNTER, WEIS, and GARTH, *Circuit Judges*

(Filed May 19, 1981)

OPINION OF THE COURT

PER CURIAM:

Essentially for the reasons set forth in the opinions of the district court, *see Commonwealth of Pennsylvania v. Local Union 542*, 469 F. Supp. 329 (E.D.Pa. 1978); 488 F. Supp. 988 (E.D.Pa. 1979); 502 F. Supp 7 (E.D. Pa. 1979), and to the extent that the judgment of the district court is challenged by these appeals, the judgment of the district court will be affirmed.

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* The Honorable Jack R. Miller, United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

Joint Appendix

FILED
DEC 3 1981
ALEXANDER L. STEVAS
CLERK

Nos. 81-280, 81-330, 81-331, 81-332, and 81-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.,
Petitioner,
v.
COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

UNITED ENGINEERS & CONSTRUCTORS, INC.,
Petitioner,
v.
COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, *et al.*,
Petitioners,
v.
COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

GLASGOW, INC.,
Petitioner,
v.
COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

BECHTEL POWER CORPORATION,
Petitioner,
v.
COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third Circuit

JOINT APPENDIX

(Counsel listed on inside cover)

PETITION FOR CERTIORARI IN NO. 81-280 FILED AUGUST 11, 1981
PETITIONS FOR CERTIORARI IN NOS. 81-330, 81-331, 81-332 AND 81-333 FILED AUGUST 17, 1981
CERTIORARI GRANTED AS TO ALL PETITIONS OCTOBER 19, 1981

JOHN G. KESTER *
JOHN J. BUCKLEY, JR.
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006
(202) 331-3069
Attorneys for Petitioner in No. 81-280

BERNARD G. SEGAL *
MARTIN WALD
NICHOLAS N. PRICE
SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, Pennsylvania 19102
(215) 988-2222
Attorneys for Petitioner in No. 81-330

JOHN J. MCALEESE, JR.*
THOMAS J. MCGOLDRICK
LOUIS A. MINELLA
CUNNIFF, BRAY & MCALEESE
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, Pennsylvania 19004
(215) 667-7080
Attorneys for Petitioners in Nos. 81-331 and 81-332

ROBERT W. KOPP *
DAVID M. PELLOW
BOND, SCHOENECK & KING
One Lincoln Center
Syracuse, New York 13202
(315) 422-0121
Attorneys for Petitioner in No. 81-333

LEROY S. ZIMMERMAN
Attorney General
MARGARET HUNTING *
JOEL M. RESSLER
Deputy Attorneys General
Office of Attorney General
Strawberry Square, 16th Fl.
Harrisburg, Pennsylvania 17120
(717) 787-5050
Attorneys for Respondent Commonwealth of Pennsylvania

HAROLD I. GOODMAN *
GERMAINE INGRAM
Community Legal Services, Inc.
Sylvania House
Juniper and Locust Streets
Philadelphia, Pennsylvania 19107
(215) 893-5354
Attorneys for Individually Named and Class Respondents

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* Counsel of record.

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NOTICE

The following opinions, orders and judgments have been omitted in printing this appendix because they appear on the following pages in the printed Appendix to the Petition for certiorari in No. 81-280, which is incorporated herein by reference:

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Certificates of service whenever appended to documents appearing herein have been omitted in printing.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

(C.A. No. 71-2698)

[Title Omitted]

EXCERPTED DOCKET ENTRIES

DATE	PROCEEDINGS
1971	
1. Nov. 8	Complaint filed.
23. Dec. 1	Defts (Local 542, Internat'l. Union of Op. Engrs. & Opertg. Engrs etc.) request for oral argument, motion to dismiss action under F.R.C.P. 12; etc.; memorandum of points & authorities sur motion to dismiss action, etc.; affidavit of Robert Walsh; and notice of motions, filed.
24. Dec. 8	Defts' (Local 542, IUOE & Joint Appr. & Trng. Comm.) motion for stay of discovery pending disposition of motion to dismiss, filed.
25. Dec. 8	Deft's (Local 542, IUOE & Joint Appr. & Trng. Comm.) memorandum of points & authorities sur motion for stay of discovery, filed.
26. Dec. 9	Plffs' memorandum of law in opposition to Local Union 542's & Joint Appr. Committee's motion for stay of discovery pending disposition of deft's motion to dismiss, filed.
27. Dec. 20	Answer of defts., General Bldg. Contrs. Association, Inc., Contractors Assoc. of Eastern Pa., United Contrs. Association, Pa. Excavating Contrs. Assoc., & Glasgow, Inc. and Certificate of Service, filed.

DATE	PROCEEDINGS
1971	
Dec. 20	CASE LISTED FOR TRIAL.
28. Dec. 20	Defts' (Operg. Engrs. Jnt. Aprntcship, & Trng. Com. of Phila., East Pa., & the St. of Delaware (Management Trustees: J. M. Washkill, et al) supplement to "motion to dismiss class action", filed.
Dec. 21	ARGUED sur deft. motion to stay discovery — C.A.V. (deft. motion to dismiss will be decided on briefs—deft may file reply brief 4 days after receipt of plff's brief)
29. Dec. 23	Plffs. memorandum of law in opposition to defts motion to dismiss, etc. filed.
1972	
34. Jan. 3	Plffs' motion for declaration of a class action & notice of motion, filed.
35. Jan. 3	Plffs' memorandum of law in support of motion for declaration of a class action, filed.
36. Jan. 4	Order dated 1/4/72 that defts' motion requesting a stay of discovery pending a decision on defts' motion to dismiss plffs' complaint, is DENIED; further ordered that all defts are to answer plffs' interrogatories within 20 days, filed. 1/5/72 entered & copies mailed. Gen. Bldg. Contrs. Assoc.
42. Jan. 25	Answer of deft. Gen. Bldg. Ctrs. Association, Inc. to certain interrogatories propounded by plffs; affidavit of Charlson I. Mehl & certificate of service, filed.
48. Feb. 7	Defts' response to plffs' motion for a declaration of a class action, filed.

DATE	PROCEEDINGS
1972	
49. Feb. 17	Plffs' reply memorandum to defts' response to plffs' motion for declaration of a class action, filed.
Feb. 18	ARGUED SUR Plffs' motion for declaration of Class Action; defts' motion to strike certain matter from complaint; defts' motion to drop certain parties plff. C.A.V.
52. Feb. 22	Supplemental answer of deft. Gen. Bldg. Contrs. Assoc., Inc. to certain interrogatories of plffs, affidavit & certificate of mailing, filed.
53. Feb. 22	Order dated 2/22/72 that the Equal Employment Opportunity Commission is GRANTED permission to file amicus curiae briefs, etc., filed. 2/23/72 entered & copies mailed.
59. Mar. 13	Order dated 3/13/72 that plffs' motion for leave to maintain this action as a class action as to class plffs is GRANTED; plffs' motion for leave to maintain this action as to class action as to class defts is GRANTED; defts' motions to drop certain parties plff & to drop the Commonwealth of Pa. as a plff are DENIED; etc., filed. 3/14/72 entered & copies mailed.
70. May 15	Order dated 5/15/72 that defts' motion to dismiss is DENIED, filed. 5/16/72 entered & copies mailed.
72. June 16	Answer of Operating Engrs. Joint Appr. & Trng. Comm. of Phila. & the State of Delaware, filed.

DATE	PROCEEDINGS
1972	
73. June 16	Answer of deft. Local 542, Internat'l. Union of Opertg. Engrs., filed.
June 20	HEARING re physical abuse of plffs et al by Union members. Witnesses sworn. Counsel for plffs permitted to file pleadings & motions for relief—to be filed by 1:30 P.M. on 6/21/72. Hearing set for 2 P.M. on 6/21/72. Intimidation, threats or harm prohibited by the Court as to all parties.
80. Aug. 4	Opinion, Higginbotham, J. and Order dtd 8/4/72 that deft., Local Union 542, are ENJOINED & RESTRAINED, pendente lite, from treatening, etc. plffs, etc.; further ordered that federal marshals shall enforce this Order, etc., filed. 8/4/72 entered & notice mailed. (cc to U.S. Marshal)
83. Aug. 18	Order dtd 8/17/72 amending Court's Opinion & Order of 8/4/72 by substitution of pages 21 & 68, etc., filed. (8/18/72 entered & copies mailed.)
84. Aug. 23	Notice of appeal of deft. Local Union 542, Internat'l. Union of Operating Engrs. (Copy to U.S.Ct. of Appeals and all other counsel of record)
111. Aug. 22	Order that plffs' Rule 37 motion to produce for inspection and copying the summaries, compilations, and computerized materials which defts have and have prepared is GRANTED; defts' motion to strike the objections of the individually named plffs and Commonwealth of Penna. to interrogatories 30-38 is DENIED etc., filed 11/24/72 entered and copies mailed

DATE		PROCEEDINGS
1973		
130. Jan.	9	Order dtd 1/9/73 that defts' Motions are DENIED for Reconsideration of Order of 11/22/72 Denying defts' Motion to Strike Objections of the Commonwealth of Pa. & individually named plffs to Interrogatories 30-54 & 63-71, etc., filed. 1/9/73 entered & copies mailed.
141. Feb.	21	Order dtd 2/21/73 that all discovery shall be completed by 5/1/73, etc., filed. 2/21/73 entered & copies mailed.
160. May	1	Order dtd 5/1/73 that a conference is set for 5/7/73 at 4:30 P.M. in chambers—Room 5000, filed. (5/2/73 entered & cys. mailed.)
163. May	8	Plffs' (individually named plffs & Commonwealth of Pa.) proposed final pretrial order, filed.
May	10	ARGUMENT: Re Deft's Motion for Order Compelling Ans. to 2nd Supplemental Interrogatories. Deft's Motion for Notice . . . To Deft. Subclass Members. NOT ARGUED; submitted on briefs.—C.A.V.
164. May	11	Plffs' supplement to their final proposed pretrial Order, (Named Plffs.), filed.
165. May	16	Letter from H.I. Goodman, Esq. (Plffs' Counsel) dtd 5/14/73 to Honorable A. Leon Higginbotham, Jr. requesting a one week continuance of the pre-trial conference now scheduled for 3:30 P.M. on 5/29/73, etc., filed.
166. May	16	Order dtd 5/16/73 that conference in this matter is continued to 6/12/73 at 4 P.M., pursuant to request in H. Goodman's ltr of 5/14/73, filed. 5/17/73 entered & cys. mailed.

DATE	PROCEEDINGS
1973	
167. May 17	Order dtd 5/16/73 (re conference held on 5/7/73), that pretrial conference scheduled for 5/29/73 is continued to 6/11/73 at 4:00 P.M., etc., filed. 5/18/73 entered & cys. mailed.
168. May 18	Order dtd 5/17/73 that the motion of deft., Local 542, for an order compelling answers to second supplemental interrogatories & for sanctions is DENIED; plffs' motion for sanctions (Docket Nos. 77 & 150) & for reimbursement of $6,903.65 & a reasonable attorney's fee is DENIED as a Rule 37, FRCB, motion, etc., filed. (5/21/73 entered & cys. mailed.)
172. May 30	Plffs', individually named plffs & Commonwealth of Pa., supplements to proposed final pretrial order, filed.
173. June 1	Proposed final pretrial order of defts Local 542, IUOE, and Joint Apprenticeship & Training Committee, filed.
174. June 1	Defts' (Contractor Associations & Contractor) proposed final pretrial order, filed.
176. June 8	Plffs' Motion to strike defts Local 542 & JAC's Request for Jury trial, & memor. in support of same, filed.
177. June 8	Plffs' response to defts' proposed final pretrial order, filed.
178. June 12	Certified copy of Judgment-Order in lieu of formal mandate received from U.S. Court of Appeals, affirming the district court injunction of 8/4/72, with costs taxed against appellant; (Costs taxed in favor of appellees as follows: Brief for appellees . . . $288.13), filed. (6/13/73 entered & cy. to Higginbotham, Jr., J.)

DATE		PROCEEDINGS
1973		
June	12	Record on appeal returned & sent to file room.
180. July	12	Order dtd 7/12/73 that pretrial conference is set for 9/4/73 at 2 P.M. in chambers. Rm 5000 filed (7/13/73 entered & cys. mailed.)
185. Sept.	7	Motion of Deft., Local 542, IUOE to vacate & set aside order granting motion for class action & memorandum, filed.
186. Sept.	7	Deft. Local 542's motion to strike plffs' pretrial memorandum or proposed pretrial order, filed.
187. Sept.	11	Letter dtd 9/10/73 from Judge Higginbotham, Jr. to James H. Jones, Negro Trade Union Leadership Council of Philadelphia & Delaware Valley, Phila., Pa. re the possible settlement of the dispute between the parties, etc., filed.
191. Sept.	14	Plffs' response to deft. Local 542's Motion to vacate & set aside order granting motion for class action, filed.
193. Sept.	18	Letter dtd 9/13/73 from James H. Jones, Negro Trade Union Leadership Council to Higginbotham, J. advising that he is willing to accept the role & conditions outlined in Letter of Higginbotham, J., etc., filed.
201. Dec.	4	Supplementary proposed final pretrial order of defts Local 542, IUOE, and Joint Apprenticeship & Training Committee, filed.
203. Dec.	11	Local 542, IUOE's object to plffs' filing with the court expert's opinions, filed.
204. Dec.	11	Plffs' motion to strike etc., the supplementary proposed final pre-trial order of defts Local 542 and JAC & memorandum of law in support of same, filed.

DATE	PROCEEDINGS
1973	
205. Dec. 12	Order dtd 12/12/73 that plff's motion to strike defts Local 542 & Joint Apprenticeship & Training Committee of Philadelphia's request for jury trial is GRANTED in that inter alia, motion of defts is untimely filed; Local 542's motion to vacate the class is DENIED; Local 542's motion to strike plff's proposed pretrial order is DENIED; & certain pending motions are listed for argument on 12/19/73 at 2 P.M. in Crtrm. #4, etc., filed. (12/13/73 entered & cys. mailed.)
206. Dec. 17	Plffs' response to deft' Local 542's objection to the plffs' filing Dr. Siskins Expert Opinions, filed.
207. Dec. 19	Answer of Local 542 & JATE to plffs'. motion to strike suppl. proposed final pre-trial order, filed.
208. Dec. 19	Contractor Associations & Contractors defts & Operating Engrs. Joint Apprenticeship & Training Committee's objection of record & certification of service, filed.
Dec. 19	ARGUMENT: re Plff's Motion to Compel Answers to Interrogatories Contractor's Motion to Strike Objections of Plffs to Interrogatories to Compel Answers to Interrogatories. Cross Motions to Allocate Cost of Natoce To Class Motions C; and cert. in service.
209. Dec. 26	Plffs. response to the objection of record filed by The Contractor, et al,/filed.
210. Dec. 27	Legal notice, filed. entr. & cys. mailed 1/2/74

1974

DATE	PROCEEDINGS
211. Feb. 12	Letter dtd 2/7/74 from Thomas A. Beckley, Esq., Harrisburg, Pa, to Honorable A. Leon Higginbotham, J. re his representation of contractors who have in the past executed collective bargaining agreements with Local Union 542, I.U.O.E., et al, & re the Court's Notice dtd 12/27/73, etc., filed
212. Feb. 12	Order dtd 2/12/74, acknowledging receipt of Document No. 211, & stating that the Court can express no opinion as to whether any possible decree would be limited solely to those persons who are current signatories, since the ultimate judgment would be dependent on the evidence presented & the evaluation of what would be an appropriate decree—if a decree should be entered in favor of plffs., filed. (2/13/73 entered & cys. mailed, with copy of Document #221)
213. Feb. 14	Affidavit of James C. Hamilton that he at no time has he ever employed a member of Local 542 or any other operating engr, etc., filed.
214. Feb. 19	Envelopes (containing Legal Notice dtd 12/27/73 of Higginbotham, J.) returned to Clerk of Court, which were addressed to: "Scranton Builders Exchange, Scranton, Pa.; Lomastro Bros., Philadelphia, Pa.; Anthony Felizzi, Inc., Newton Square, Pa.; Middle Atlantic, Clayton, Delaware; Concrete Placement, Secane, Pa.; Crest-Con, Inc., Cherry Hill, N.J.; Keystone Concrete of N.J., Bala-Cynwyd, Pa.; Turner Const. Co., Radnor, Pa.; Benjamin Brothers, Philadelphia, Pa.; Corbits, Inc.; Phila., Pa., S&M Contr., Philadelphia, Pa.", and filed.

DATE	PROCEEDINGS
1974	
215. Feb. 20	Letter dtd. 2/15/74 from Schucker Construction Co., Reading, Pa. to Honorable A. Leon Higginbotham, Jr. re receipt of the Court's "Legal Notice", etc. and requesting that Schucker Constr. Co. be exonerated as a deft., etc., filed.
216. Feb. 20	Letter dtd 2/20/74 to Higginbotham, J. from F.A. Nemia, Esq. re Court's Legal Notice of 12/27/74, & advising that he is counsel for The Building Trades Employers Div. of the Associated Building Contractors of the Triple Cities, Inc. & Binghamton Steel Erectors, Inc., John Garbade & Son, Inc., John K. Hagopian Rigging Co., Inc., Howard & Spragse, Inc., William H. Lane, Inc., P F C Construct Co., Inc. & Murray Walter, Inc., filed.
217. Feb. 22	Letter dtd 2/15/74 to Higginbotham, J. from Midwestern Welding Company, Ltd., Suite 900 Franklin Building, Tulsa, Oklahoma 74103, advising the Midwestern Welding Company, Limited does not have a contract with Local Union 542 & is not a member of one of the classes defined in the legal notice, etc., filed.
218. Feb. 22	Envelopes (containing Legal Notice dtd 12/27/74 of Higginbotham, J.) returned to Clerk of Court, which were addressed to: "Earl Goods, Phila., Pa.", "Curtis T. Bedwell & Sons, Collingdale, Pa.", "Bernardino Constr. Co., Cornwells Heights, Pa.", "Con-Company, State College, Pa.", "B.F.B., Bristol, Pa.", "Kenmons Wilson Constr., Wilmington, Del.", "Babcock-Wilcox, Claymont, Del", and "Wellpoint Dewatering, Easington, Pa.", and filed.

DATE	PROCEEDINGS
1974	
219. Mar. 12	Letter dtd 3/6/74 to Higginbotham, J. from Henry M. Irwin, Esq., Keylin & Irwin, advising that their office represents The Gerngross Corporation & that although The Gerngross Corp. has in its employ a member of Local Union 542, I.U.O.E., it has not entered into any written agreement with said Local of the International Union of Operating Engineers & is not a member of the Operating Engineers Association of Eastern Pa. and Delaware; therefore, The Gerngross Co. does not come within the Classes designated in the Court's Legal Notice, etc., filed.
220. Mar. 12	Letter dtd 3/6/74 to Higginbotham, J. from Schnader; Harrison, Segal & Lewis advising that they are att'ys. for United Engineers & Constructors Inc., & advising that the company no notice of this suit prior to The Court's Legal Notice of 12/27/74 & that it is the position of the Company that it could not appropriately be bound by any judgment against it entered in this case, etc., filed.
221. Apr. 15	Defts', Local 542, IUOE and JATC, Motion for Jury Trial, Memorandum in support of same & Notice, filed.
222. Apr. 15	Plffs' Answer to defts' Motion for Jury Trial & Memorandum of Law Contra defts' Motion for Jury Trial, filed.
223. May 2	Order dtd 5/2/74 that the Motion for Jury Trial of defts., Local Union 542, International Union of Operating Engineers, et al, is DENIED, filed. (5/3/74 entered & copies mailed.)

DATE		PROCEEDINGS
1974		
224. Jun.	6	Order of Court dtd 6/6/74 that the Motion to Compel Answers to Interrogatories of plffs., Commonwealth of Pa., et al. is GRANTED, Deft., Local 542, I.U.O.E., must serve supplemental answers to plffs' interrogatories 5(a), 5(b) & 5(c) within 10 days of receipt of this Order, etc.; Defts' Motion to Strike Objections on grounds of untimeliness is DENIED, etc., filed. (6/7/74 entered & copies mailed.)
228. Jul.	24	Defts' (Contractor Associations & Contractor) Supplement to their Final Proposed Pretrial Order, & Notice, filed.
229. Jul.	24	Pltffs' Motion to Strike deft. Contractors & Contractor Associations Supplement to their Final Proposed Pre-trial Order & Certification of Service, filed.
230. Aug.	5	Answer of defts' (Contractor Associations & Contractor) to plff's Motion to Strike the defts' supplementary proposed final pretrial order & Notice thereof, filed.
231. Aug.	15	Answer of Local 542, IUOE and Joint Apprenticeship and Training Committee, filed.
237. Sept.	5	Defts' (Contractor Assoc. & Contractor) memorandum in opposition to plffs' motion to strike deft. Contractors & Contractor Associations' Supplement to their final proposed pre-trial order, & Cert. of Service, filed.
Sep.	12	ARGUED: Re: Plffs' Motion to Strike deft. contractors Supplement to their final Pretrial Order: Ordered that pretrial conference set for 9/20/74 at 3:15 P.M. in Chambers. Trial is tentatively set for 12/16/74

DATE	PROCEEDINGS
1974	
	at 10 A.M. Counsel should be able to discuss trial date & pretrial procedures. Plffs' Motion to Strike Certain Witnesses to be listed for argement on 11/1/74. Argument on the instant motion by counsel—Motion C.A.V.
239. Sept. 16	Plffs' Memorandum of Law in further support of their motion to strike the supplement to the proposed final pre-trial order of defts Local 542 and JAC, filed.
240. Sept. 24	Motion by deft. Barger Construction, Inc. for Summary Judgment, Memorandum in support thereof & Affidavit of Wayne Snodgrass, filed.
246. Oct. 23	Answer of defts Local 542, IUOE & JATC to Motion by deft. Barger Construction 3c. for Summary Judgment & New Matter, filed.
Nov. 1	ARGUED: re Plff's motion to strike certain witnesses, Barger Motion for Summary Judgment—Motions—C.A.V.
248. Nov. 12	Memorandum Order dtd 11/12/74 that upon The Motion of plffs for Sanctions & Contempt of Order of 6/6/74 (Doc. #241), that defts. Local 542 & Joint Apprenticeship & Trng. Comm. are GRANTED 15 days to submit to plffs & file with the Court detailed answers to these supplemental interrogatories, etc. Further Ordered that defts shall pay plffs' counsel, community Legal Services, Inc. the sum of $200.00 as costs for preparation & prosecution of plffs' motion, filed. (11/13/74 entered & copies mailed.)

DATE	PROCEEDINGS
1974	
249. Nov. 12	Memorandum Order dtd 11/12/74 re Plffs' Motion to Strike defts' supplemental final pre-trial Order, etc., & granting plffs 3 days to propound to defts interrogatories requesting information concerning Dr. Pearl, etc., filed. (11/13/74 entered & copies mailed.)
250. Nov. 12	Order dtd 11/12/74 that Plffs' Motion to Strike, Etc., the Supplementary Proposed Final Pretrial Order of Defts Local 542 and JACK (Doc. #204) is DENIED, filed. (11/13/74 entered & copies mailed.)
251. Nov. 15	Order dtd 11/15/74 designating Pretrial Order Numbers to various docket entries, etc., filed. (11/15/74 entered & copies mailed.)
254. Nov. 18	Letter dtd 11/15/74 from H.I. Goodman, Esq. plffs' counsel) to Honorable A. Leon Higginbotham, Jr. advising that plffs have decided not to oppose the motion of class deft. Barger Construction, Inc. for summary judgment, etc., filed.
255. Nov. 20	Motion of defts the Contractors Assoc. of Eastern Pa. & the General Bldg. Contrs. Assoc., Inc., that the Honorable A. Leon Higginbotham, Jr. recuse himself from this action & that another judge be assigned & Affidavits of Angelo A. Antonucci & Charlson I. Mehl in support of motion & Certificate of J.J. McAleese, Jr., Esq. that the affidavit of Angelo A. Antonucci in support of the Motion to Recuse was made in good faith, filed.
256. Nov. 25	Plffs' Memorandum of Law in Opposition to defts' Motions for Disqualification of Judge Higginbotham, filed.

DATE	PROCEEDINGS
1974	
257. Nov. 27	Deft's reply brief of Local 542 to Plffs' memorandum in opposition to disqualification of Judge Higginbotham, filed.
259. Dec. 4	Opinion, Higginbotham, J. & Order dtd 12/4/74 that the Motions for Disqualification filed by defts, Local 542, et al, are DENIED, filed. (12/5/74 entered & notice mailed.) (Pretrial Order #29)
260. Dec. 24	Order amending the Opinion filed 12-4-74, filed. (Pretrial Order #30) 12-26-74 entered and copies mailed.
261. Dec. 31	Certified copy of Order received from U.S. Court of Appeals, petition of Local 542 for writ of mandamus and/or prohibition is DENIED, filed, 1/2/75 entered & copy to Judge Higginbotham. (#76-22)
262. Dec. 21	Certified copy of order received from U.S. Court of Appeals, petition of Contractors Assoc of Eastern Penna et al for Writ of Mandamus and/or Prohibition is DENIED, filed, 1/2/75 entered & copy to Judge Higginbotham.
1975	
263. Jan. 15	Letter dtd 11/18/74 from A. F. Mimnaugh, Esq. to Judge Higginbotham requesting that Mr. Goodman's letter of 11/15/74 not be entered on the record as it does not contain a true statement as to the facts, etc., filed.
265. Jan. 16	Deft., Local 542, Internat'l. Union of Operating Engineers, Motion For Stay of Proceedings, filed.
266. Jan. 29	Pffs' response to defts' motion for stay of proceedings, filed.

DATE	PROCEEDINGS
1975	
267. Feb. 6	Order dtd 2/6/75 that deft's Motion for Stay of Proceedings is DENIED and DISMISSED, filed. (Pretrial Order #31) (2/7/75 entered & copies mailed.)
271. Feb. 10	Ltr. dtd 2/7/75 to Juge Higginbotham (re legal Notice of 12/27/73) from I. Herbert Rothenberg, Esq., Elkins Park, Pa. advising that his client, Penn Construction Industries, Phila., Pa., wishes to & does "opt" out of this action inasmuch as it is neither a member of any contractor associations which are parties to a collective bargaining agreement with Local 542, I.U.O.E., nor a direct party to nor subject to any collective bargaining agreement with nor employs any individuals represented by Local Union 542, filed.
272. Feb. 10	Letter dtd 2/7/75 from D. P. Kyros, Esq., Chicago, Illinois to Judge Higginbotham (re Legal Notice of 12/27/73) advising that J.L. Manta, Inc. is not a party to any agreement with Local Union 542, I.U.O.E., etc., filed.
273. Feb. 11	Letter dtd 2/4/75 from Joseph L. Leece, Inc., Williamsport, Pa. to Judge Higginbotham (re Legal Notice) advising that Joseph L. Lecce, Inc. does not have a signed agreement with Local Union 542, etc., filed.
274. Feb. 11	Order dted 2/11/75 that the opinion filed 12/4/74 is amended as follows: Add footnote 34A to the caption that appears at the top of page 37, etc., filed. (2/12/75 entered & copies mailed.) (Pretrial Order)

DATE	PROCEEDINGS
1975	
275. Mar. 5	Order dd. 3/4/75 that a conference is set for 4/9/75 at 2 P.M. in Room 5000, etc., filed. (3/6/75 entered & copies mailed. (Pretrial Order)
275. Mar. 5	Letter dd. 2/27/75 from C. J. Wilder, Esq. (re Legal notice dd. 12/27/73 sent to Bell & Howell, Phillipsburg Div., Phillipsburg, N.J.) requesting advise as to whether Bell & Howell is a party to this action, filed.
276. Apr. 1	Letter dd. 3/28/75 to Judge Higginbotham from Green Construction Co. Des Moines, Iowa re legal notice, etc., filed.
Apr. 9	Pretrial Conference, Higginbotham, J.
277. Apr. 11	Letter dd. 2/3/75 to Judge Higginbotham from John C. Knox & Sons, Lewistown, Pa. (re Legal notice) advising that they are not affiliated with any of the Unions, filed.
278. Apr. 11	Letter dd. 2/13/75 from E.I. DuPont de Nemours & Co., Wilmington, to Judge Higginbotham (re Legal Notice) advising that The DuPont is not now & has never been a member of any one of the four contractor associations named as defts., etc., filed.
279. Apr. 11	Letter dd. 2/24/75 from J.F. Ingram, Esq., Birmingham, Alabama to Judge Higginbotham (re Legal Notice) advising that his client, The Ingalls Iron Works Company does not appear to fall within the described class, etc., filed.
280. Apr. 15	Transcript of 4/9/75, Pretrial Order No. 34, filed.

DATE	PROCEEDINGS
1975	
281. Apr. 30	Ltr. dd. 2/10/75 from Morris Newmark & Bro., Inc., Phila., Pa. advise that they have had no dealings with Local 542 International Union & should not be involved, filed.
282. May 21	Pretrial Order No. 35, dd. 5/21/75, that Doc. #259 is designated as Pretrial Order #29; Doc. #260 as Pretrial Order #30; Doc. #267 as Pretrial Order #31; Doc. #274 as Pretrial Order #32 and Doc. #275 is designated as Pretrial Order #33, filed. (5/22/75 entered & copies mailed.)
283. June 3	Letter dd. 5/28/75 to Judge Higginbotham from Frank A. Newig, Esq. Binghamton, N.Y. advising that he does not presently represent the contractors, Binghamton Steel Erectors, Inc., et al, named in his letter dd. 2/20/75, & that he has recommended that each contr seek the advise of of their respective attorneys, etc., filed.
285. June 11	Certified copy of Order dd. 2/25/75 received from U.S. Court of Appeals, denying the motion of Local 542, International Union of Operating Engineers, for a stay of all further proceedings in the Court, for want of jurisdiction in the U.S. Court of Appeals, filed. (6/12/75 entered & copy mailed to Judge Higginbotham)
290. Aug. 8	PRETRIAL Order No. 37, that a conference is scheduled for 9/22/75 at 4:00 P.M. in crtrm. 15-B to cover issues referred to in Pretrial Order #36, etc., filed. (8/8/75 entered & copies mailed)

DATE		PROCEEDINGS
1975		
291. Sep.	9	Letter dd. 9/5/75 from Kramer, Wales & McAvoy, Esqs., Binghamton, N.Y. to Attn of Judge Higginbotham, advising that they are the personal attorneys for William H. Lane, Inc., a member of the Associated Build Contractors of the Triple Cities, Inc., & that they wish to advise their clients how to respond to Pre-Trial Order #36, & requesting copies of certain documents, etc., filed.
295. Sep.	23	Plffs' Rule 37 Motion to compel supplemental discovery from deft. Joint Apprenticeship & Training Committee, Notice, & Cert. of Service, filed.
296. Sep.	25	Plffs' Rule 37 Motion to compel supplemental discovery from defts Contractor Associations, notice & cert. of service, filed.
297. Sep.	25	Plffs' Rule 37 Motion to compel supplemental discovery from deft. Glasgow, Inc., filed.
298. Sep.	25	Copy of Letter dd. 9/25/75 from H.I. Goodman, Esq. to Judge Higginbotham enclosing Plffs' Proposed Order regarding severance, etc.
299. Sep.	26	Answer to deft. Contractor Assocs. & Deft. Contractor to Plffs' Rule Motion to compel production of computer tapes & printouts utilized by defts Contractor Associations' & Grasgow, Inc.'s. Expert Witness and/or Strike said expert from the defts' witness list, Memorandum in support thereof & Cert. of Service, filed.
300. Sep.	26	Deft. Glasgow, Inc's Answer to plffs' Rule 37 Motion to Compel Supplemental Discovery, Memorandum in support thereof & Cert. of Service, filed.

DATE		PROCEEDINGS
1975		
301. Sep.	26	Deft. Contractor Associations' Answer to plffs' Rule 37 Motion to Compel Supplemental Discovery, Memorandum in support thereof & Cert. of Service, filed.
Oct.	1	PRETRIAL CONFERENCE: re Rule 37 motions filed etc. on behalf of plffs. etc. Defts' Motions, if any, are to be filed pursuant to Rule 37 & are due by 10/3/75. Further conference set for 10/20/75 at 3:45 P.M.
296. Oct.	6	Pretrial Order No. 39, dd. 10/3/75 that plffs' Motion for Supplemental Discovery is GRANTED & defts Contractor Associations are Ordered to produce certain documents to plffs' counsel by 10/16/75, etc., filed. (10/7/75 entered & copies mailed)
297. Oct.	6	Pretrial Order No. 40, dd. 10/3/75, that plffs' motion for supplemental discovery is GRANTED & deft. Glasgow, Inc. is Ordered to produce certain documents to plffs' counsel by 10/16/75, etc., filed. (10/7/75 entered & copies mailed.)
297. Oct.	6	Pretrial Order No. 41, dd. 10/3/75, that plffs' motion for supplemental discovery is GRANTED & deft. JATC is Ordered to produce certain documents to plffs' counsel by 10/16/75, etc., filed. (10/7/75 entered & copies mailed.)
292. Oct.	6	Pretrial Order No. 42, dd. 10/3/75, that plffs' motion for suppl discovery is granted & deft. Local 542 is Ordered to produce cert. documents to plffs' counsel by 10/16/75, etc., filed. (10/7/75 entered & copies mailed.)

DATE		PROCEEDINGS
1975		
303. Oct.	6	Plffs' Rule 37 Motion to compel the production of the computer & printouts utilized by defts Contractor Associations' & Glasgow expert witness and/or to strike said expert from the defts' witn list; Memorandum in support of Motion, Notice & cert. of service, filed.
303. Oct.	6	Pretrial Order No. 43, dd. 10/3/75, that plffs' Rule 37 Motion to Compel the production of certain computerized materials is GRANTED & defts Contractor Associations & Contractors are Ordered to produce various tapes, etc. to plffs' counsel by 10/16/75, etc., filed. (10/7/75 entered & copies mailed.)
304. Oct.	6	Pretrial Order No. 44, dd. 10/3/75 that the trial in this case shall be bifurcated, etc., filed. (10/7/75 entered & copies mailed.)
314. Oct.	21	Pretrial Order No. 45 (dated 10/16/75) that the Motion of deft. Barger Construction, Inc. for Summary Judgment is DENIED, etc., filed. (10/23/75 entered & copies mailed.)
327. Nov.	3	Report No. 7 of Dr. Bernard Siskin (Supplemental Reports on Hours, Wages, Wage Rates & Labor Pool, filed.
Nov.	3	ARGUMENT HEARING: re Plff's Motion for Sanctions & Deft's Motion for Supplemental Discovery: Counsel argued. Motions CAV. The transcript of these proceedings will stand as pretrial Order No. 45. Conference set for 11/17/75 at 4 P.M.
328. Nov.	5	Minutes of Argument/Hearing held on 11/3/75, filed.

DATE		PROCEEDINGS
1975		
329.	Nov. 6	Supplemental Report No. 7 of Dr. Bernard Siskin on Hours, Wages, Wage Rates & Labor Pool, filed.
330.	Nov. 17	Pretrial Order No. 46 (Transcript of 9/22/75), filed.
331.	Nov. 17	Pretrial Order No. 47 (Transcript of 11/3/75), filed.
	Nov. 17	PRETRIAL CONFERENCE: Final pretrial conference January 7, 1976, 4 p.m. Trial date—1/12/76 at 10:00 a.m. Estimated length of trial 4 months. Judge Higginbotham wants it specially listed.
	Nov. 19	Minutes of 11/17/75, filed.
332.	Nov. 19	Memorandum Order dd. 11/19/75 (Pretrial Order No. 48) that defts' request contained in paragraph three of their Motion for Supplemental Discovery is DENIED WITHOUT PREJUDICE to renewal of said request of conditions stated in the memorandum, filed. (11/20/75 entered & copies made.)
334.	Nov. 30	Letter dd. 12/23/75 to Judge Higginbotham from Frank Nemia, Esq. advising that he will no longer act as a clearinghouse for transmitting legal documentation & that all legal notices be sent to certain contractors, in New York, filed.
1976		
335.	Jan. 5	Plffs' supplement to proposed final pre-trial order, filed.
336.	Jan. 6	Motion of defts Local 542 & JATC to strike plffs' supplement to their proposed final pretrial order, filed.

DATE		PROCEEDINGS
1976		
337. Jan.	9	Motion of deft. Contractor Associations & deft. Contractor to strike plffs' supplement to their proposed final pretrial order & cert. of service, filed.
Jan.	9	Pretrial Conference: (Started 10:10AM concluded 11:00AM) Final pretrial conference set for 1/14/75 at 2:00 PM.
338. Jan.	9	Minutes of pretrial conference held on 1/9/76, filed.
Jan.	14	Pretrial Conference: Argument on Motion to Strike Plffs' proposed amendment to pretrial order of 6/73. Plffs' will produce their exhibits. Pretrial conference scheduled for 1/15/76 at 10 AM.
339. Jan.	15	Minutes of Pretrial Conference held on 1/14/76, filed.
Jan.	15	Pretrial Conference: Authenticity of documents: counsel will confer in courtroom on exhibit list. Pretrial conference set for 1/19/76 at 10 A.M.
340. Jan.	15	Minutes of pretrial conference held on 1/15/76, filed.
Jan.	19	HEARING on authenticity of Plffs' documents (exhibits): Witnesses sworn. Hearing will reconvene on 1/21/76 at 10:00 A.M.
341. Jan.	20	Minutes of hearing held on 1/19/76, filed.
Jan.	21	HEARING re authenticity of exhibits: plffs' witness sworn. TRIAL (NON-JURY) BEGINS: Plffs' witness sworn. (Dr. B. Siskin).
347. Jan.	28	Plffs' memorandum of law in support of the admissibility of the E.E.O.C. Files, filed.

DATE		PROCEEDINGS
1976		
Jan.	28	Trial resumes: Dr. H. Siskin resumed testimony. Plff's witness J.J. Nunes Deft. moved to strike testimony re E.E.O.C. file. Argument by counsel re admissibility of E.E.O.C. records & reference thereto. The Court DENIED the motion to strike & admitted the EEOC records. Mr. Numes resumed testimony.
358. Feb.	18	Second supplemental proposed final pretrial order of defts Local 542 IUOE, and JATC, filed.
Feb.	18	NON-JURY TRIAL RESUMES: Plffs' witness James Joseph Nunes resumed testimony. A.E. Freedman, Esq. made oral motion to strike Mr. Nunes testimony—DENIED. In the alternative, another oral motion was made to strike EEOC records testified to by Mr. Nunes—Ruling C.A.V. by the Court. Court adjourned until 3/8/76 at 10 A.M.
361. Mar.	8	Deft. Local 542's Motion for Continuance, Memorandum of Law, & affidavits of Homer G. Dawson, et al in support of motion, filed.
362. Mar.	8	Plffs' response to deft. Local 542's Motion for a Continuance, filed.
363. Mar.	8	Motion by Local 542, IUOE, to Amend Answer to plffs' Complaint, Memorandum sur motion, & notice, filed.
364. Mar.	9	Memorandum, Higginbotham J. & Order dd. 3/9/76 that deft. Local Union 542's motions of 3/4/76 & 3/8/76 (re continuance) are DENIED; the parties are directed to proceed to trial on 3/12/76 at 9:30 a.m., filed. (3/10/76 entered & copies mailed)

DATE	PROCEEDINGS
1976	
365. Mar. 12	Certified copy of Order dd. 3/11/76 received from U.S. Court of Appeals, denying motion of Local 542, I.U.O.E. for Stay of all Further Proceedings, without prejudice to its renewal at a proper time, etc., filed. (3/12/76 entered & copy mailed to Judge Higginbotham)
366. Mar. 12	Deft. Local 542, I.U.O.E.'s Motion for Stay of Proceedings, filed.
367. Mar. 12	Deft., Local 642, I.U.O.E.'s Supplemental motion for stay of proceedings with copy of affidavit of Martin Gibbs, M.D., re medical condition of Homer Dawson (deft's witness) etc., filed.
368. Mar. 12	Deft., Local 542, I.O.U.E.'s supplemental motion for continuance with affidavit of Martin Gibbs, M.D., re condition of H. Dawson, filed.
369. Mar. 12	Order dd. 3/12/76 that the supplemental motions for stay of proceedings and supplemental motions for continuance are DENIED, filed. 3/12/76 entered & copies exit.
371. Mar. 15	Certified copy of Order received from U.S. Court of Appeals DENYING the Petition for Writ of Mandamus and/or Prohibition, filed 3-16-76 entered and copy to Judge Higginbotham.
274. Mar. 18	Certified copy of Order dd. 3/17/76 received from U.S. Court of Appeals Denying the Supplemental Petition of Local 542, I.U.O.E. for Writ of Mandamus and/or Prohibition, filed. (3/19/76 entered & copy to Judge Higginbotham)

DATE	PROCEEDINGS
1976	
375. Mar. 18	Certified copy of Order dd. 3/17/76 received from U.S. Court of Appeals Denying the Supplemental Motion of Local 542, I.U.O.E. for Stay of Proceedings, filed. (3/19/76 entered & copy to Judge Higginbotham).
Mar. 18	Trial resumes. Plffs' witness. Wm. Ciavaglia resumed testimony. Court adjourned until 10 AM on 3/22/76.
443. Aug. 5	Affidavit of Thomas J. McGoldrick, Esq. re service of "Legal Notice", to certain business organizations, pursuant to directive of Higginbotham, J., together with certified mail—return receipts, filed.
444. Aug. 11	Fourth Supplemental Proposed Final Pretrial Order of deft. Local 542, IUOE, filed.
459. Oct. 5	Motion of Local Union 542, FOR STAY of Proceedings, filed.
482. Oct. 7	Certified copy of order received from U.S. Court of Appeals that motion to stay is DENIED, filed. 10/12/76 entered & copy to Judge Higginbotham.
503. Nov. 4	Affidavit of T. J. McGoldrick, Esq. (att'y. for named contractor deft & contractor associations) re mailing legal notices to certain business organizations, filed.
548. Nov. 23	NON-JURY TRIAL RESUMES: Plffs Witness J. V. Denise resumed testimony (court recessed for numerous conferences) Plffs' witness R. Goodwin sworn. Order: Argument re: whether plffs have met their burden of proof or whether case should be dismissed will be heard at end of Mr. Dent's

DATE	PROCEEDINGS
1976	
	testimony on 12/13/76. Defts shall be prepared to proceed with their case on 12/14/76. Evidence shall be heard until 12/22/76 & trial will commence again no later than 1/10/77. Court adjourned until 10:00 A.M. on 12/13/76, filed.
Nov. 24	Second Supplemental record transmitted to U.S. Court of Appeals. (Document #546 only—Document #541 was transmitted to U.S.C.A. on 11/
549. Dec. 2	Motion of deft. contractor associations & deft. contractor For Reconsideration of the ruling of 11/23/76, filed.
550. Dec. 8	Plffs' Reply to defts' Motion for Reconsideration.
551. Dec. 8	Fifth Supplemental Proposed Final Pretrial Order of Deft., Local 542, IUOE, filed.
552. Dec. 13	Plffs' response & motion to strike the fifth supplemental proposed final pretrial order of deft. Local 542, IUOE, filed.
557. Dec. 16	Commonwealth of Pa's Response & Motion to Strike The Fifth Supplemental Proposed Final Pretrial Order of deft. Local 542, IUOE, filed.
559. Dec. 20	Update to defts' Contractor Associations & Contractor, Proposed Final Pretrial Order, with exhibits thereto, filed.
562. Dec. 22	Plffs' Response & Motion to Strike the Update to defts' (Contractor Associations & Contractor) Proposed Final Pretrial Order, filed.

DATE		PROCEEDINGS
1977		
569. Jan.	11	Deft. Contractor, Contractor Associations, Operating Engineers Joint Apprenticeship & Training Committee, et al's Motion for Stay of an order pending a final determination of defts' petition for writ of mandamus and/or prohibition & Cert. of service, filed.
572. Jan.	12	Certified copy of U.S. Court of Appeals Order dd. 1/11/77, denying the petition of Local 542, I.U.O.E. for writ of mandamus, filed. (1/12/77 entered & copy mailed to Judge Higginbotham)
576. Jan.	17	Certified copy of U.S. Court of Appeals Order dd. 1/14/77, denying the petition of The Contractors Association of Eastern Pa. et al for writ of mandamus, filed. (1/18/77 entered & copy mailed to Judge Higginbotham)
580. Jan.	20	Letter dd. 1/19/77 from H. I. Goodman, Esq. (plffs' counsel) to Judge Higginbotham re letter of A. Mimnaugh, Esq. dd. 1/11/77; & advising that plffs do not object to testimony of a witness from Barger Construction Co. & requesting that Mr. Minaugh name & identify his witness & any exhibits, etc., filed.
589. Feb.	8	Letter dd. 1/31/77 from M. Wald, Esq. (att'y. for United Engineers & Constructors Inc. & Catalytic, Inc.) to Judge Higginbotham, request a meeting to discuss this case, etc., filed.

DATE	PROCEEDINGS
1977	
590. Feb. 8	Order dd. 2/8/77, in response to letter from M. Wald, Esq. (doc. #58 that a conference is scheduled for 2/22/77 at 2 P.M. in Room 156 Mr. Wald is directed to advise all appropriate parties of the time of the conference, filed. (2/9/77 entered & copies mailed.)
662. Jun. 27	*ORDER BY THE COURT:* Plff's Memorandum of Law, Finding of Facts and briefs etc. due by 9/6/77. Deft's papers due by 11/22/77. Reply briefs due by 12/12/77: Final Argument is set for 12/16/77, filed LH
663. Jun. 28	NON-JURY TRIAL RESUMED (on 6/28/77): Mr. Mimnaugh as counsel for some contractor defts stated his clients' positions on the record. Ruling by the Court on exhibits. The Record is Closed. Court is Adjourned.
664. July 8	Petition of nonparties United Engineers & Constructors Inc., Catalytic, Inc., Fluor Corp. & Bechtel Corporation for Leave to File Motion & Supporting Memorandum of Law; & Cert. of Service thereof upon. J. J. McAleese, Jr., Esq., A. E. Freedman, Esq. & H. I. Goodman, Esq., filed.
667. Sept. 7	Pltffs' Proposed findings of fact (Vol. I), filed
668. Sept. 7	Plffs' Proposed Findings of Fact (Vol. II), filed
669. Sept. 7	Plffs' Proposed Findings of Fact (Vol. III), filed
670. Sept. 7	Plffs' Proposed Findings of Fact (Vol. IV), filed

DATE	PROCEEDINGS
1977	
687. Nov. 4	Motion of Non Parties United Engineers & Constructors, Inc. et al to Dismiss all claims against the deft sub-Class of Contractor-Employers and to decertify the deft sub class or, in the Alternative, to Recertify said sub-class and supporting Memorandum of Law, filed
688. Nov. 21	Letter dd. 11/9/77 from M. Wald, Esq., on behalf of United Engineers & Constructors Inc. and Catalytic, Inc. & Fluor Corp. to Judge Higginbotham, Jr. requesting permission to file an additional memorandum of law, etc., filed.
689. Nov. 21	Letter dd. 11/10/77 from H.I. Goodman, Esq. to Judge Higginbotham, Jr. advising that plffs' have no objection to Mr. Wald's filing the Memorandum contemplated by his letter dd. 11/9/77, etc., filed.
690. Nov. 21	Order dd. 11/21/77 that the request made in M. Wald's letter of 11/9/77 is GRANTED with the brief being filed on or before 11/22/77 & reply briefs, if any, being filed within 7 days thereafter, etc., filed. (11/22/77 entered & copies mailed.) (LH-Cir.)
691. Nov. 22	Defts Local 542's & JATC's Requests for Findings of Fact & Conclusions of Law, filed.
692. Nov. 22	Brief on behalf of defts Local 542, I.U.O.E. & J.A.T.C., filed.
693. Nov. 22	Request of defts. Contractors Assoc. of Eastern Pa., Gen'l. Bldg. Contractors Assoc., Inc., Pa. Excavating Contractors

DATE	PROCEEDINGS
1977	
	Assoc., United Contractors Assoc., Operating Engineers Joint Apprenticeship & Training Committee of Philadelphia, Eastern Pa. & Delaware, and Glasgow, Inc. for Findings of Fact, Conclusions of Law & Judgment, filed.
694. Nov. 22	Request of defts Contractors Association of Eastern Pa., et al for Findings of Fact, Conclusion of Law & Judgment, Volume II, filed.
695. Nov. 22	Request of defts. Contractors Assoc. of Eastern Pa. et al for Finding of Fact, Conclusions of Law & Judgment, Volume III, filed.
696. Nov. 22	Memorandum of defts. Contractors Association of Eastern Pa., et al in Support of their Request that all relief requested against them be Denied & that a Judgment for them be made & entered, filed.
697. Nov. 23	Memorandum of Non Party Petitioners United Engineers & Constructors, Inc., Catalytic, Inc. and Fluor Corp. in support of their proposed recertification of the plff. class, filed.
698. Nov. 30	Plffs' Memorandum of Points & Authorities in Opposition to the Motion of Class defts' United Engineers & Constructors, Inc., Catalytic, Inc., Fluor Corp. & Bechtle Corp. to Dismiss all claims against the deft. subclass of contractor-employers & to decertify the deft sub-class or, in the alternative, to re-certify said sub-class pursuant to Rule 23(b), filed.

DATE	PROCEEDINGS
1977	
699. Dec. 7	Ulffs' brief in opposition to memorandum of class defts United Engineers & Constructors, Inc., Catalytic, Inc. & Fluor Corp. for Recertification of the Class, filed.
700. Dec. 8	Response by the four deft. associations & Glasgow to the nonparties' memorandum of law, filed.
701. Dec. 8	Reply brief of Non parties United Engineers & Constructors Inc., Catalytic, Inc., Fluor Corp. & Bechtle Corp. in response to plffs' memorandum in opposition to nonparties' motion to dismiss & decertify deft. class, etc., filed.
702. Dec. 12	Plffs' response to the Named defts' proposed findings of fact & named defts supporting memoranda of law, filed.
702A. Dec. 12	Exhibit "A" to plffs' response to the named defts' proposed findings of fact named defts' supporting memoranda of law, filed.
709. Dec. 20	Letter dd. 12/19/77 from H.I. Goodman, Esq. (plffs' counsel) to Judge Higginbotham re Plffs' Response to the Named Defts' Proposed Findings of Fact & Conclusion of Law—(letter incorporating Collier into previous discussion of this issue, et al.
710. Dec. 23	Reply brief of nonparty petitioners United Engineers & Constructors Inc., Catalytic, Inc. and Fluor Corp. in support of their proposed recertification to plff. Class, filed.
1978	
713. Jan. 17	Letter dd. 1/5/78 from plffs' att'y., H. Goodman, Esq. to Judge Higginbotham re finding of intentional discrimination against defts., etc., filed.

DATE	PROCEEDINGS
1978	
714. Jan. 17	Letter dd. 1/11/78 from M. Wald, Esq. (defts' att'y.) in response to H. Goodman's letters of 1/5/78 & 12/19/77, etc., filed.
717. Jan. 25	Memorandum of points & authorities in support of deamned of class defts United Engineers & Constructors Inc., Catalytic, Inc., Fluor Corp. and Bechtel Corp. for Jury Trial, filed.
718. Jan. 27	Plffs' ltr. of 1/18/78 advising that they will not be filing a Motion to Amend the Complaint to allege Title VII jurisdiction over the named & class deft. contractor associations & contractor-employer, filed.
719. Jan. 27	Plffs' Motion to Strike Deft. Class Members, United Engineers & Constructors, Inc., Catalytic, Inc., Fluor Corp. & Bechtel Corp's Demand for Jury Trial, Memorandum of Points & Authorities in Opposition to Class Defts' Demand for a Jury Trial, filed.
723. Feb. 10	Supplemental brief of United Engineers & Constructors, Inc. and Catalytic, Inc., filed.
725. Apr. 18	Letter dd. 4/17/78 from M. Wald, Esq. (for defts. United Engineers & Constructors, et al to Judge Higginbotham, Jr., re an additional reason why the deft. class should be recertified pursuant to Rule 23(b)(3), etc., filed.
756. Nov. 30	Opinion, HIGGINBOTHAM, C.J., filed. (IMPOUNDED) (11/30/78 entered-1/2/79)
757. Nov. 30	Order re: opinion impounded, filed. (IMPOUNDED) (11/30/78 entered-1/2/79)
758. Nov. 30	Order that Opinion be filed as of this date & be impounded, etc., filed. 11/30/78 entered & copies mailed.

DATE	PROCEEDINGS
1978	
759. Nov. 30	Agreement of counsel re: proposed form of order, filed.
760. Nov. 30	Order impounded by Court, filed. (IMPOUNDED) (11/30/78 entered-1/2/79 copies mailed.) (LH)
Nov. 30	SETTLEMENT CONFERENCE, HIGGINBOTHAM, C.J.
1979	
763. Jan. 2	ORDER DD. 1/2/79 THAT THE OPINION & ORDERS IMPOUNDED ON 11/30/78 ARE TO BE RELEASED FROM IMPOUNDMENT AS OF THIS DATE, FILED. (1/2/79 entered) (cys. mailed)
Jan. 2	Documents #756, 757 & 769 released from Impoundment.
778. Feb. 28	Motion of Non-Party Petitioners United Engineers & Constructors Inc., Catalytic, Inc. and Bechtel Corp. for Order Governing Stage II, filed.
779. Feb. 28	Memorandum of United Engineers & Constructors Inc. et al in Support of Motion for Stage II, filed.
780. Feb. 28	Nonparty Petitioners United Engineers & Constructors Inc., Catalytic, Inc. & Bechtle Corp's Response to & Suggested Changes of Plffs' proposed Declarator Judgment, Final Injunctive Decree, & Order Regarding Stage II Proceedings & Damages, filed.
781. Feb. 28	Memorandum of Law on Nonparty Petitioners United Engineers & Constructors Inc., Catalytic, Inc., and Bechtel Corp. in support of requested modification of plffs proposed order, filed.

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782. Feb. 28	Response of deft. Contractor Associations & Contractor to plffs' Proposed Order, filed.
783. Feb. 28	Response of the Joint Apprenticeship & Training Committee of Phila., Eastern Pa. & Delaware to plffs' Proposed Order, filed.
784. Feb. 28	Proposed Injunctive Decree submitted on behalf of deft. Local 542, International Union of Operating Engineers, filed.
785. Feb. 28	Memorandum on behalf of Local 542 in Support of its proposed injunctive decree & in response to plffs' proposed decree, filed.
786. Mar. 7	Response of United Engineers & Constructors Inc., Catalytic, Inc. & Bechtle Corp. to Memoranda & proposed Decrees submitted by Local 542, The Deft. Contractor Associations & Glasgow, filed.
787. Mar. 7	Memorandum on Local 542 in reply to the response to The Contractor Association and Glasgow, Inc., filed.
788. Mar. 8	Response of deft. Contractor Associations & Contractor to Proposed Order of deft. Local 542, filed.
789. Mar. 8	Plffs' Brief in reply to the proposed injunctive decrees & responses of the named defts & class defts. United Engineers & Constructors, Inc., Catalytic, Inc. & Bechtel Corp., filed.
791. Apr. 17	PETITION OF NONPARTIES UNITED ENGINEERS & CONSTRUCTORS INC., CATALYTIC, INC. & BECHTEL CORP. FOR LEAVE TO FILE MOTION, SUPPORTING MEMORANDUM OF LAW & RESPONSE TO PLFF'S PROPOSED ORDER, FILED.

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793. Apr. 24	ORDER DD. 4/23/79 THAT THE PETITION OF NONPARTIES UNITED ENGINEERS & CONSTRUCTORS INC., CATALYTIC, INC. & BECHTEL CORP. FOR LEAVE TO FILE MOTION, ETC. (DOC. #791) IS GRANTED NUNC PRO TUNC, ETC., FILED (4/24/79 entered & copies mailed.) (LH)
796. Apr. 27	Plff. Commonwealth of Pennsylvania's supplemental memorandum of law in support of Plffs' proposed order for injuctive relief, filed.
797. Apr. 30	Plffs' Answer in Reply to the Motion of Deft. Local 542 To Join The Office of Federal Contract Compliance Programs & its Director, Weldon J. Rougeau, as Additional Parties; Plffs' Memorandum of Law in Opposition to Motion of Local 542 for Joinder of Additional Parties; & Cert. of Service, filed.
798. May 1	Plffs' response to the proposed injunctive decree of deft. Local 542; & cert. of service, filed.
799. May 3	Deft. Contractor Associations & deft. Glasgow's Proposed Supplemental Pleading (Amended Answer); & Cert. of Service, filed. (re joinder of the O.T.C.C.P. & W.J. Rougeau, etc.)
800. May 7	Memorandum of behalf of Local 542 in response to the Commonwealth of Pa's supplemental memorandum & cert of service, filed.

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803. June 7	MEMORANDUM, HIGGINBOTHAM, C.J. RE DENIAL OF DEFTS. MOTION TO JOIN ADDITIONAL PARTIES, ETC., FILED. (6/7/79 entered & copies mailed.) (LH)
805. July 17	Deft., Local 542's MOTION TO PRESERVE STATUS QUO, MEMORANDUM, & Cert. of Service, filed.
806. July 18	ORDER THAT RESPONDING PARTIES FILE THEIR ANSWERS & BRIEFS, TO "MOTION OF LOCAL 542 TO PRESERVE STATUS QUO", BY 9:00AM 7/23/79; & ALL PARTIES TO BE PREPARED FOR ORAL ARGUMENT IN CHAMBERS AT 3:00 P.M. 7/23/79, FILED. (7/18/79 entered & copies mailed.) (LH)
807. July 23	Plfs' Answer in Opposition to the Motion of deft. Local 542 to Preserve the Status Quo; brief in opposition to motion, filed.
808. July 23	Defts. General Bldg. Contractrs. Assoc., Contractors Association Eastern Pa. & Glasgow, Inc. Answer to Motion to Preserve Status Memorandum In Opposition to Motion to Preserve Status Quo; & Cert. of service, filed.
809. July 23	ARGUMENT re Local 542's Motion to Preserve the Status Quo (re hire through the hiring hall): Court convened. Counsel argued. Oral ORDER: Counsel shall meet & agree on figures setting forth the number of referrals by each District to the number of minority referrals in each District. (Side-Bar Conference)

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	Counsel shall present the above information to the Court before 12 Noon on 7/24/79. A conference with counsel is set for 7/25/79 at 10:00 A.M. in Chambers, filed. (LH)
811. July 25	MEMORANDUM, HIGGINBOTHAM, C.J.: RE DEFT., LOCAL 542's MOTION TO PRESERVE STATUS QUO WITH RESPECT TO THE EXCLUSIVE HIRING HALL SYSTEM, ETC., FILED. (7/26/79 entered & copies mailed.) (LH)
812. July 25	ORDER DD. 7/25/79 THAT DEFT EMPLOYERS CONTINUE TO ADHERE TO THE HIRING HALL PROVISIONS OF THEIR COLLECTIVE BARGAINING AGREEMENT WITH LOCAL UNTIL 8/31/79, ETC., FILED. (7/26/79 entered & copies mailed.) (LH)
813. Aug. 3	Supplement to Response of Defendants Contractor Associations and Contractor to plffs' proposed order; & cert. of service, filed.
814. Aug. 8	JUDGMENT AND DECREE, HIGGINBOTHAM, CIRCUIT JUDGE, DD. 8/8/79, FILED. (LH) (received 8/8/79 at 10:55 A.M.) (8/8/79 entered) (11/7/79 copies mailed.)
815. Aug. 8	ORDER DD. 8/8/79, PURSUANT TO AGREEMENT OF ALL COUNSEL, THAT THE JUDGMENT & DECREE FILED THIS DATE BE IMPOUNDED, & NOT SUBJECT TO INSPECTION BY EITHER THE PARTIES, THEIR COUNSEL, OR ANY MEMBER OF THE PUBLIC, UNTIL FURTHER ORDER OF THIS COURT. A SUPPLEMENTARY OPINION WILL BE

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		FILED WITH THE ORDER RELEASING THE JUDGMENT & DECREE FROM IMPOUNDMENT. THE JUDGMENT & DECREE WILL NOT BECOME EFFECTIVE UNTIL RELEASED FROM IMPOUNDMENT. TIME WILL NOT BEGIN TO RUN FOR TAKING AN APPEAL UNTIL THE JUDGMENT & DECREE IS RELEASED FROM IMPOUNDMENT, FILED. (8/8/79 entered) *(11/7/79 cys. mailed) (LH) (received 8/8/79 at 10:55 A.M.)
	Aug. 8	Documents #814 & #815 SEALED & IMPOUNDED (11/7/79 released from Impoundment & Copies mailed.)
824.	Sept. 5	ORDER DATED 9/5/79 THAT PURSUANT TO THIS COURT'S MEMORANDUM ORDER OF 7/25/79 IT IS ORDERED THAT DEFT. EMPLOYERS CONTINUE TO ADHERE TO THE HIRING HALL PROVISIONS OF THEIR COLLECTIVE BARGAINING AGREEMENT WITH LOCAL 542 UNTIL 10/1/79, ETC., FILED. 9/5/79 ENTERED AND COPIES MAILED.
829.	Oct. 31	Stipulation that JATC shall proceed with selection of an apprentice class for 1979, etc., filed. (proposed Order received)
830.	Nov. 7	OPINION, HIGGINBOTHAM, C.J. (DD. 11/7/79) SUPPLEMENTING & EXPLAINING A DECREE FILED ON 8/8/79, & RELEASING THE DECREE FROM IMPOUNDMENT, ETC., FILED. (LH)
		11/7/79 entered & copies mailed with cys. of Docs #814 & #815.

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831. Nov. 7	ORDER DD. 11/7/79 THAT THIS COURT'S ORDER OF 8/8/79 IMPOUNDING THE JUDGMENT & DECREE OF 8/8/79 BE VACATED & THE CLERK OF THE COURT IS DIRECTED TO MAKE AVAILABLE AT THE SAME TIME THE JUDGMENT & DECREE OF 8/8/79 & THE OPINION OF 11/7/79, FILED. (LH)
	11/7/79 entered & copies mailed with cys. of Docs. #814 & #815.
832. Nov. 19	Pltffs' Motion to Amend The Court's Judgment & Decree; Memorandum of law in support of motion; Notice & Cert. of Service, filed.
833. Nov. 26	Motion of Deft. Local 542, I.U.O.E. to Amend or Alter Judgment & Decree; Memorandum in support thereof; Notice & Cert. of Service, filed.
834. Nov. 28	Deft., Local 542, I.U.O.E.'s Response to Pltffs' Motion to Amend The Court's Judgment & Decree; & Cert. of Service, filed.
835. Nov. 28	Deft. Contractor Assocs. & Glasgow, Inc.'s Response to Pltff's Motion To Amend the Court's Judgment & Decree; & Cert. of Service, filed.
836. Nov. 28	Deft. Contractor Assocs. & Glasgow, Inc.'s Response to Motion of deft. Local 542, I.U.O.E. to Amend or Alter Judgment & Decree, & cert. of service, filed.
837. Nov. 28	Pltffs' Reply & Brief in Opposition to Motion of deft. Local 542 to Amend or Alter the Court's Judgment & Decree; & cert. of service, filed.

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838. Nov. 29	Letter dd. 11/27/79 from J.G. Handler, Esq., Counsel for Commonwealth of Pa., requesting that this letter be made part of official rec. & advising that the Commonwealth of Pa. Joins the Individually named & class Pltffs' Motion to Amend the Court's Judgment & Decree, etc., filed.
840. Dec. 7	ORDER DD. 12/6/79 THAT THIS CASE BE REASSIGNED FROM THE CALENDAR OF JUDGE A. LEON HIGGINBOTHAM, JR. TO THE CALENDAR OF JUDGE LOUIS C. BECHTLE, FILED. (12/7/79 entered & copies mailed)
841. Dec. 13	Pltffs' Motion for an Extension of Time in which to File Their Motion for en Award of Counsel Fees & Costs; & Cert. of service, filed. (Proposed Order attached)
842. Dec. 17	Appearance of Margaret Hunting, Esq. Dept. of Justice, Harrisburg, Pa. for Commonwealth of Pa., & Cert. of service, filed.
843. Dec. 17	Contractor Associations et al response to motion of Local 542 for approval of implementation of decree, & Cert. of Service, filed.
844. Dec. 17	Pltffs' Reply & Brief in Opposition to motion of deft. Local 542 for approval of implementation of decree, filed. (Proposed Order attached)
845. Dec. 17	MOTION OF DEFT. LOCAL 542 FOR APPROVAL OF IMPLEMENTATION OF DECREE, NOTICE, MEMO. OF LAW IN SUPPORT, FILED.

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846. Feb. 21	ORDER DD. 2/21/80 THAT PLFFS' REQUEST FOR AN EXTENSION OF TIME IN WHICH TO FILE THEIR MOTION FOR AN AWARD OF COUNSEL FEES & COSTS IS GRANTED & SUCH MOTION SHALL BE FILED ON OR BEFORE 3/10/80, FILED. (L.) 2/22/80 entered & copies mailed & cy. mailed to Higginbotham, C.J.
847. Feb. 29	POST DECREE ORDER #1: ORDER DD. 2/29/80 THAT A HEARING WILL BE HELD ON 3/17/80 AT 9:30 AM IN CRT-RM.12B AT WHICH TIME THE COURT WILL COVER THE FOLLOWING MATTERS: THE RENDERING OF A DECISION BY THE COURT ON PLFFS' MOTION TO AMEND THE JUDGMENT & DECREE OF 8/8/79, ETC. FILED. (3/3/80 entered & copies mailed.) (LB)
848. Mar. 10	Individually Named & Class plffs' Motion for an Award of Counsel Fees & Costs, Affidavit of Harold I. Goodman, et al, & Pltffs' Memorandum of Costs & Disbursements, filed.
849. Mar. 10	MOTION OF COMMONWEALTH OF PA. FOR AWARD OF ATTORNEYS FEES, AFFIDAVITS OF MARGARET H. HUNTING, ET AL IN SUPPORT OF MOTION: & CERT. OF SERVICE, FILED.
850. Mar. 10	MEMORANDUM OF LAW IN SUPPORT OF MOTION OF COMMONWEALTH OF PA. FOR AWARD OF ATTORNEYS' FEES, filed.

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853. Mar. 19	PLFFS' MOTION FOR AN EXTENSION OF THE LIFE OF THE COURT'S JUDGMENT AND DECREE, FILED
857. Mar. 24	Response of deft. Contractor Associations and deft. Employer to post decree No. 1, filed.
858. Mar. 24	MOTION OF DEFT. CONTRACTOR ASSOCIATIONS AND GLASGOW, INC. TO AMEND THE JUDGMENT AND DECREE, CERT. OF SERVICE, FILED.
862. Mar. 25	POST DECREE ORDER #2 THAT MOTION OF PLTFS TO AMEND JUDGMENT & DECREE OF 8/8/79 DENIED WITHOUT PREJUDICE. DEFTS CONTRACTORS ASSN. ET AL SHALL BY 3/28/80 FILE FORMAL NOTICE TO AMEND JUDGMENT & DECREE ETC. FRANK W. JENKINS, ESQ. IS APP. MASTER DURING THE PENDENCY OF THE LIFE OF THE JUDGMENT & DECREE ETC. BEFORE 3/28/80 EACH ATTORNEY INTENDING TO APPEAR AS ATTORNEY OF RECORD REPRESENTING PARTICULAR PARTY SHALL FILE WITH THE CLERK OF COURT A CURRENT ENTRY OF APPEARANCE AND THOSE ATTORNEYS SHLL BE DEEMED COUNSEL OF RECORD FOR FUTURE PURPOSES OF NOTICES, ORDERS AND OTHER COMMUNICATIONS ISSUED BY THE CLERK, FILED. 3/26/80 entered and copies mailed.
863. Mar. 26	Pltfs' brief in support of their motion for an award of counsel fees and costs.

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865. Mar. 26	ORDER THAT THE MOTION OF THE INDIVIDUALLY NAMED AND CLASS PLTFS FOR AN EXTENSION THE LIFE OF THE JUDGMENT AND DECREE (Document #814) IS HEREBY GRANTED, WITH —— OF THE 8/8/79, JUDGMENT & DECREE TO BE STRICKEN AND LANGUAGE SUBSTITUTED, ETC. (Post Decree #3) 3/27/80 entered and copies mailed.
866. Mar. 27	POST DECREE ORDER #4 THAT ¶40 OF THE JUDGMENT & DECREE IS REVISED AND THE PARTIES ARE TO RESPOND TO THE ACCEPTABILITY OF THE REVISION BY FILING WITH THE CLERK ON OR BEFORE 4/2/80 A MEMORANDUM SETTING FORTH THEIR PRECISE OBJECTIONS IF ANY, AND SUGGESTIONS FOR CHANG WITH SUPPORTING RATIONALE, ETC., FILED. 3/27/80 entered and copies mailed.
871. Mar. 28	Ltr. Dtd. 3/27/80 from Frank W. Jennkins, Esq. to Hon. Louis C. Bechtle re: Mr. Jenkins acceptance of the appointment as Master in this action, etc., filed.
876. Mar. 31	POST DECREE ORDER #5 THAT ADVISORY COMMITTEE SHALL DESIGNATE ONE MEMBER AS SECRETARY WHO SHALL MAINTAIN & PRESERVE MINUTES OF EACH MEETING, ETC., FILED. LB 3/31/80 entered & copies mailed.
885. Apr. 10	Supplemental memorandum of law of non-pty petitioners United Engineers & Constructors Inc. and Bechtel Corp. in support of Motion to decertify deft. class,

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890. Apr. 15	Defts, Contractors Assoc. of Eastern Pa., General Bldg. Contractors Assoc., Inc. United Contractors Assoc., The PA. Excavating Contractors Assoc. and Glasgow, Inc. NOTICE OF APPEAL, filed.
	4/16/80 entered & copies to U.S.C.A., Herbert Newberg, Francis A. Mastro, Marvin I. Barish, Frank Jenkins, Thompson Powers, Harold Goodman, Martin Wald, Robert W. Kopp, Margaret Hunting, and Arthur R. Littleton, Esqs.
892. Apr. 15	Deft., Operating Engineers Joint Apprenticeship and Training Committee of Phila., Eastern Pennsylvania and the State of Delaware NOTICE OF APPEAL, filed.
	4/16/80 entered & copies mailed to: U.S.C.A., Herbert Newberg, Francis Mastro, Frank Jenkins, Thompson Powers, Harold I. Goodman, Martin Wald, Robert Kopp, Margaret Hunting and Arthur R. Littleton, ESQS.
894. Apr. 15	Deft., Local Union 542, Internation Union of Operating Engineers, NOTICE OF APPEAL filed.
	4/16/80 entered & copies mailed to: U.S.C.A., Herbert Newberg, Francis Mastro, Frank Jenkins, John J. McAleese, Jr., Thompson Powers, Harold I. Goodman, Martin Wald, Robert W. Kopp, Margaret Hunting & Arthur Littleton, Esqs.
896. Apr. 16	PLTFS' MOTION TO AMEND ¶ 27 OF THE COURT'S JUDGMENT AND DECREE, INDIVIDUALLY NAMED PLTFS' MEMORANDUM OF LAW IN SUPPORT AND CERT. OF SERVICE, FILED.

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897. Apr. 16	INDIVIDUALLY NAMED AND CLASS PLTFS' MOTION FOR APPROVAL OF THE INCLUSION OF EARNINGS DATA IN CERTAIN REPORTS REQUIRED BY ¶ 43 OF THE JUDGMENT & DECREE, MEMORANDUM IN SUPPORT THEREOF AND CERT. OF SERVICE, FILED.
898. Apr. 16	Individually named and class pltfs' memorandum of law in support of their proposed Order re apportionment of the costs of notice under ¶ 45 of the Judgment & Decree & cert. of service, filed.
899. Apr. 16	Individually named and class pltfs' memorandum of law in support of their proposed Order re Apportionment of the costs incident to the services of the Court-Appointed Master, & cert. of service, filed.
900. Apr. 16	Individually named and class pltfs' memorandum of law in support of their proposed program for publicizing the rights and opportunities available to minorities under the Court's judgment & decree, and cert. of service, filed.
902. Apr. 16	DEFT, LOCAL 542 MOTION TO AMEND JUDGMENT AND DECREE, MEMORANDUM IN SUPPORT THEREOF, FILED.
903. Apr. 16	DEFT. LOCAL 542 MOTION FOR APPROVAL OF PROPOSED ALLOCATION OF COSTS OF ADVISORY COMMITTEE, REPORTING COMMITTEE AND PUBLICITY PROGRAM, MEMORANDUM IN SUPPORT THEREOF AND CERT. OF SERVICE, FILED.

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904. Apr. 16	Deft. Local 542, Memorandum on reporting system, filed.
905. Apr. 16	Deft. Local 542, Memorandum on allocation of costs of notice, filed.
906. Apr. 16	Deft. Local 542, Memorandum on allocation of costs of master, filed.
907. Apr. 16	Deft. Local 542, Recommended program to publicize opportunities under the judgment & decree, filed.
909. Apr. 16	DEFT, CONTRACTOR ASSOCIATIONS AND GLASGOW, INC.'S MOTION TO AMEND ¶ 27 OF THE JUDGMENT AND DECREE,
910. Apr. 16	Defts' Contractor Assoc. and Glasgow, Inc. memorandum of law re: Payment of costs of notice to members of pltf and deft clases, & cert. of service, filed.
911. Apr. 16	Defts' Contractor Assoc. and Glasgow, Inc. memorandum of law re: Payment and apportionment of costs incident to master, and cert. of service, filed.
912. Apr. 16	Deft. JATC Employer Trustees memorandum of law re: Payment of costs of notice to members of pltf and deft class, & cert of service, filed.
913. Apr. 16	Deft. JATC Employer Trustees memorandum re: Payment of Master's fees, & cert. of service, filed.
914. Apr. 16	Non-pty member deft. United Engineers & Constructors Inc.'s NOTICE OF APPEAL, filed.
	4/17/80 entered & copies to: U.S.C.A., Herbert Newberg, Francis Mastro,

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	Marvin I. Parish, Frank Jenkins, Thompson Powers, Harold Goodman, Robert Kopp, Margaret Hunting, John McAleese, Jr., and Arthur R. Littleton, ESQS.
916. Apr. 17	Non-pty member Deft. Bechtel Power Corp., memorandum of law concerning allocation of costs related to the Court appointed Master, filed.
917. Apr. 17	Non-pty member deft. Bechtel Power Corp. Memorandum of law concerning allocation of the cost of post-judgment notice to class members, filed.
919. Apr. 17	Non-pty petitioner United Engineers & Constructors Inc.'s Memorandum on allocation of costs of notice to class members & on costs incident to services of Master, filed.
920. Apr. 17	Notice of Appeal of Non-pty member deft. Bechtel Power Corporation, filed.
	4/17/80 entered & copies to: U.S.C.A., Herbert Newberg, Francis Mastro, Marvin I. Parish, Frank Jenkins, Thompson Powers, Harold Goodman, Martin Wald, Margaret Hunting, John J. McAleese, Jr. and Arthur Littleton, Esqs.
923. Apr. 25	ORDER DTD. 4/24/80 THAT THIS COURT'S OPINION OF 11/7/79 BE AMENDED, AMENDING PAGE 6 ¶ 1, 3rd SENTENCE AND PAGE 6 FOOTNOTE ONE, FIRST SENTENCE, FILED. LH/LB
	4/25/80 entered & copies mailed.

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927. Apr. 30	POST DECREE ORDER #8 THAT THE RENEWED AND AMENDED NOTICES TO MINORITY BENJAMIN FRANKLIN GRADUATES ARE HEREBY APPROVED BY THE COURT, AND THESE NOTICES SHALL BE TRANSMITTED TO THE APPROPRIATE PARTIES OR POSTED, AS REQUIRED BY THE JUDGMENT AND DECREE, WITHIN THIRTY (30) DAYS OF THE DATE OF THIS ORDER ETC., FILED LB. 4/30/80 ENTERED & COPIES MAILED.
928. Apr. 30	POST DECREE ORDER #6 THAT THE MOTION OF DEFTS. CONTRACTOR ASSOCIATIONS AND GLASGOW, INC. TO AMEND THE JUDGMENT AND DECREE BY SUPPLEMENTING THE REQUIREMENT OF ¶ 40 IS DENIED; ETC., FILED. 4/30/80 ENTERED AND COPIES MAILED.
929. Apr. 30	POST DECREE ORDER #7 THAT A HEARING WILL BE HELD ON 5/13/80 AT 9:30AM ON CERTAIN ISSUES, FILED. 4/30/80 entered and copies mailed.
936. May 8	DEFTS' MOTION TO AMEND PARAGRAPH 8 OF POST DECREE ORDER #5, & CERT. OF SERVICE, FILED.
937. May 8	Pltfs' response to defts' motion to amend paragraph 8 of post decree order #5, filed.
941. May 13	ARGUMENT SUR: Motion of ptys to amend ¶ 27 of the Judgment & Decree and on various costs—Order to be entered, filed.

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942.	May 15	POST DECREE ORDER #9, THAT DEFT. LOCAL 542'S MOTION TO AMEND ¶ 27 OF THE JUDGMENT AND DECREE IS DENIED, PLTFS' MOTION TO AMEND SAME IS DENIED, MOTION OF DEFTS CONTRACTOR ASSOCIATIONS & GLASGOW, INC. FOR SAME IS DENIED, THE PTYS SHALL FILE WITH THE CLERK OF COURT BY 5/23/80 A JOINTLY PREPARED PROPOSED ORDER TO AMEND ¶ 27 OF THE JUDGMENT & DECREE, THE PTYS SHALL ALSO FILE JOINTLY BY 5/21/80 A PREPARED LIST OF THE MAJOR NEWSPAPERS IN THE FIVE DISTRICTS OF LOCAL 542 INCLUDING A LIST THE MINORITY ORIENTED NEWSPAPERS, PLTFS' MOTION FOR APPROVAL OF THE INCLUSION OF EARNINGS DATE IN CERTAIN REPORTS REQUIRED BY ¶ 43 IS GRANTED, PLTFS' MOTION FOR REIMBURSEMENT OF EXPENSES AND PROVISION OF JOB SECURITY FOR ADVISORY COMMITTEE MEMBERS IS DENIED IN PART & GRANTED IN PART, DEFTS' MOTION TO AMEND ¶ 8 OF POST DECREE ORDER #5 IS GRANTED & AND ¶ 8 IS STRICKEN & SUBSTITUTED, THE PTYS SHALL FILE WITH THE CLERK ON OR BEFORE 6/12/80 SEPARATE LEGAL MEMORANDA, PTYS WISHING TO RESPOND TO OPPOSING MEMORANDA SHALL DO SO ON OR BEFORE 6/17/80 BY FILING SUCH WITH THE CLERK, FILED. (DTD. 5/14/80) LB.
		5/16/80 entered & copies mailed.

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943. May 15	INDIVIDUALLY NAMED & CLASS PLTFS' MOTION TO AMEND ¶ 43(c) and (d) OF THE COURT'S JUDGMENT & DECREE AND CERT. OF SERVICE, FILED.
947. May 23	MOTION OF DEFT, LOCAL 542, IUOE, TO AMEND THE JUDGMENT AND DECREE AND TO APPROVE REVISED NOTICES, MEMORANDUM IN SUPPORT AND CERTIFICATE OF SERVICE, FILED.
948. May 23	Transcript of Post Decree Hrg. #2, dtd. 5/13/80, filed.
949. May 23	JOINT MOTION OF DEFT. LOCAL 542, INT'L UNION OF OPERATING ENGINEERS, & INDIVIDUALS NAMED AND CLASS PLTFS TO AMEND ¶ 43(c) and (d) OF THE COURT'S JUDGMENT & DECREE, AND CERT. OF SERVICE, FILED.
950. May 23	INDIVIDUALLY NAMED AND CLASS PLTFS' BRIEF IN OPPOSITION TO LOCAL 542's REVISED CRITERIA FOR ENTRY INTO THE UNION AND STANDARDS FOR MASTER AND ASSISTANT MASTER MECHANICS, FILED.
951. May 23	PLTFS' MOTION FOR AMENDMENT OF ¶ 27 OF THE JUDGMENT AND DECREE, MEMORANDUM AND CERT. OF SERVICE, FILED.
—. May 28	ORDER DTD. 5/22/80 THAT THE COURT FINDS PROBABLE CAUSE FOR CRIMINAL CONTEMPT AGAINST JAMES FRANCIS MULHOLLAND, ARNOLD ACCHIONE AND LOCAL 542, FOR VIO-

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	LATION OF TITLE 18 U.S.C. § 401(3) FOR DISOBEDIENCE AND/OR RESISTANCE OF COURT'S LAWFUL DECREE OF 8-8-79, ETC., FILED. (MISC. 80-0443) LB
	5/29/80 entered & copies mailed.
952. May 29	POST DECREE ORDER #10 CONCERNING THE IMPOSITION AND ALLOCATION OF CERTAIN SUMS THAT WILL BE REQUIRED TO BE PAID IN CONNECTION WITH THE IMPLEMENTATION OF THE PROVISIONS OF THE COURT'S DECREES HERETOFORE AND HEREAFTER ENTERED, ETC., AND THE MASTER IS DIRECTED TO FILE WITH THE COURT WITHIN 20 DAYS OF THE DATE OF THIS ORDER A BUDGET SETTING FORTH AN ITEMIZED LIST OF ALL SUMS ESTIMATED TO BECOME DUE & PAYABLE DURING THE NEXT 120 DAYS, ETC., FILED. LB
	5/30/80 entered & copies mailed.
953. June 4	POST DECREE ORDER #11 DTD. 6/3/80 THAT THE MOTION OF THE PLTFS TO AMEND ¶ 43(c) AND (d) OF THE COURT'S JUDGMENT AND DECREED IS GRANTED, ETC., FILED. LB
	6/5/80 entered & copies mailed.
954. June 9	DEFT. GLASGOW, INC'S MOTION FOR REARGUMENT AND RECONSIDERATION, MEMORANDUM IN SUPPORT AND CERT. OF SERVICE, FILED.

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955. June 9	DEFT. CONTRACTOR ASSOCIATIONS MOTION FOR REARGUMENT AND RECONSIDERATION, MEMORANDUM IN SUPPORT AND CERT. OF SERVICE, FILED.
956. June 9	POST DECREE ORDER #12 THAT THE INITIAL PROGRAM OF PUBLICITY REQUIRED UNDER ¶ 47 OF THE COURTS JUDGMENT & DECREE OF 8/8/79, BE ENTITLED "PHASE I", SHALL PROCEED AS FOLLOWS: THE FIRST NOTICE SHALL BE PLACED IN THOSE NEWSPAPERS STARTING IN THE 6/18/80, EITHER AS SOON THEREAFTER AS THE COURT MAY BY SEPARATE ORDER DIRECT ETC.. FILED.
	6/10/80 entered & copies mailed.
957. June 10	POST DECREE ORDER #13, THAT THE PRELIMINARY INTERIM BUDGET OF THE MASTER IS APPROVED BY THE COURT AND IS FOUND TO BE DIRECTELY RELATED TO THE INJUNCTIVE ASPECTS OF THIS LITIGATION, THE PTYS IN ACCORDANCE WITH POST DECREE ORDER & SHALL PAY TO THE CLERK OF COURT THE FOLLOWING AMTS: Local 542—$8,600 (40%), JATC—$5,375 (25%), CONTRACTORS' ASSOCIATION—$2,150 (10%), UNITED CONTRACTOR ASSOC.—$2,150 (10%), GENERAL BLDG. CONTRACTORS' ASSOC.—$2,150 (10%) and GLASGOW, INC.—$1,075 (5%), THE CLERK OF THE COURT UPON RECEIPT OF THE FUNDS IS DIRECTED TO DEPOSIT

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	THE SAME, INTO THE SPECIAL ACCOUNT ESTABLISHED THE MASTER, THE MASTER IS AUTHORIZED TO WITHDRAW AND DISBURSE SUCH SUMS AS BECOME NECESSARY TO THE INJUNCTIVE ASPECTS OF THIS LITIGATION.
	6/10/80 entered & copies mailed.
959. June 12	Individually named and class pltfs' brief in opposition to the Motion of "Non-ptys" to decertify the deft. class of Contractor Employers for purposes of assessing damages at state II, filed.
960. June 12	Deft's United Engineers & Contractors Inc. and Bechtel Power corp.s second supplemental memorandum in support of Motion to decertify deft. class prior to stage II and for Order governing Stage II, filed.
961. June 12	Deft. Local 542, IUOE, Memorandum in opposition to the decerification of deft. class for purposes of phase ii of this litigation cert. of service, filed.
964. June 16	POST DECREE ORDER #14 (DD. 6/16/80) AMENDING POST DECREE ORDER THE PUBLICATION DATE FOR PLACING FIRST LEGAL NOTICE ADVERTIS IS EXTENDED FROM 6/18/80 TO 6/25/80, ETC. THE PARTIES, IN ACCORD WITH POST DECREE ORDER #10 SHALL PAY TO THE CLERK OF THE COURT 1:00 P.M. ON 6/20/80 CERTAIN SUMS OF MONIES, ETC. MOTION OF D— CONTRACTOR ASSOCIATIONS & GLASGOW, INC. FOR REARGUMENT & RECONSIDERATION OF POST

DATE	PROCEEDINGS
1980	
	DECRE ORDER #10, CONCERNING ISSUE OF ALLOCATION COSTS AMONG THE PARTIES IS DENIED, FILED. (LB)
	6/17/80 entered & copies mailed.
965. June 17	Plffs. reply brief in response to memorandum of United Engineers Contructors Inc. et al seeking decertification of deft. class propr to stage 11, filed.
966. June 17	Reply brief of United Engineers & Constructors Inc. et al in s—— of motion for decertification of class, filed.
967. June 17	Memorandum of United Engineers & Constructors Inc. in opposition to motion for reargument and reconsideration by Glasgow Inc., filed.
968. June 18	Non party Deft. Bechtel Power Corp.'s memorandum in opposition to motion of Glasgow, Inc for reargument and reconsideration of the allocation of costs, filed.
971. June 27	POST DECREE ORDER #15 (FOLLOWING HEARING) (DD 6/27/80) THAT THE MOTION OF PLFFS (FILED 5/23/80 TO AMEND ¶ 27 OF THE JUDGMENT & DECREE IS DENIED WITHOUT PREJUDICE, ETC. THE COURT DIRECTS THE MASTER TO SUBMIT APPROPRIATE FORMS OF ORDER TO THE COURT DIRECTING THE CLERK OF THE COURT TO DISBURSE FUNDS IN THE REGISTRY OF THE COURT, ETC., FILED. (LB)
	6/27/80 entered & copies mailed.

DATE	PROCEEDINGS
1980	
972. June 27	CERTIFICATION OF F.W. JENKINS, MASTER RE COSTS & EXPENSES, ETC., FILED.
972. June 27	ORDER DD. 6/27/80 THAT THE REGISTRY OF THE COURT PAY TO THE OFFICE OF THE MASTER THE AMOUNT OF $17,775.00. THIS AMOUNT COVERS EXPENSE OF THE MASTER'S OFFICE FOR THE PERIOD 6/12/80 THROUGH 7/31/80. PAYMENT SHALL BE MADE BY CHECK DRAWN TO THE ORDER OF FRANK W. JENKINS MASTER, FILED. (LB) 6/27/80 entered & copies mailed.
—. June 27	$17,775.00 Paid out of the Registry of the Court (Per J. Zingo-Fiscal)
973. June 27	NOTICE OF APPEAL OF DEFTS., THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, THE GENERAL BULIDING CONTRACTORS ASSOCIATION, INC., THE UNITED CONTRACTORS ASSOCIATION AND GLASGOW, INC.; & Certificate of service, FILED. Certified copy mailed to Clerk, U.S. Court of Appeals with certified copy of docket & Copies mailed to: H.B. Newberg, Esq.; Apruzzes & McDermott; M.I. Barish, Esq.; F.W. Jenkins, Esq.; H.I. Goodman-G. Ingram Esqs.; Steptoe & Johnson; M. Wald & N. Price, Esqs.; Bond, Schoeneck & King; M. Hunting, J.I. Drew, Esq. A.R. Littleton & D.J. Morikawa, Esqs.

DATE		PROCEEDINGS
1980		
975. July	2	NOTICE OF APPEAL OF DEFTS., THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, THE CENTRAL BUILDING CONTRACTORS ASSOCIATION, INC., THE UNITED CONTRACTORS ASSOCIATION AND GLASGOW, INC; & Certificate of service, filed.
		Certified copy mailed to Clerk, U.S. Court of Appeals with certified copy of docket; and Copies mailed to: H.B. Newberg, Esq.; Appruzzes & McDermott; M.I. Barish, Esq.; F.W. Jenkins, Esq.; H.I. Goodman-G. Ingram, Esq.; Steptoe & Johnson; M. Wald & N. Price, Esqs., Bond, Schoeneck & King; M. Hunting, J.I. Drew, Esq., A. R. Littleton & D.J. Morikawa, Esqs.
978. July	9	Transcript of Post-Decree Hearing #3, dated 6/20/80, filed.
979. July	9	Cert. copy of Order, U.S.C.A. that the appellees motions to dismiss for lack of subject matter jurisdiction are GRANTED without pr—— to the right of appellants to file a timely new appeal pursuant F.R.Ap. P. 4 within 30 days of the date of the district court e— a final ruling on all motions to amend ¶ 27 of the 3/80 judgment decree, filed.
—. July	9	Original Record Returned (sent to J. Bechtle)
989. July	14	JOINT MOTION OF THE PTYS FOR AN ORDER MODIFYING THE EFFECTIVE DATES OF THE JUDGMENT AND DECREE AND CERT. OF SERVICE, FILED.

DATE	PROCEEDINGS
1980	
991. July 15	ORDER THAT THE REGISTRY OF THE COURT SHALL PAY TO FRANK W. JENK MASTER, THE AMT. OF $4,220.00, ETC., FILED. LB 7/16/80 entered & copies mailed.
992. July 15	POST DECREE ORDER #16, THE COURT DIRECTS COUNSEL FOR THE PTLF FILE WITH THE CLERK ON OR BEFORE 7/21/80 A PETITION ON APPROPRIATE LEGAL GROUNDS NAMING SUCH PTYS AS COUNSEL SEEKS RELIEF IN RESPECT TO., THE COURT FINDS THAT THERE IS A POTENTIAL CONFLICT OF INTEREST WITH THE MASTER AS TO ¶ 10(a) OF THE JUDGMENT & DECREE AND THIS CONSTITUTES A PROPER GROUND FOR RECUSAL OF THE MASTER AND IN SU—— RECUSAL THE COURT WILL HEAR AND DETERMINE THE MATTER ITSELF, ETC., FILED. LB 7/16/80 entered & copies mailed.
993. July 15	POST DECREE ORDER #17, THAT THE TIME PERIOD IN WHICH THE LEGAL ADVERTISEMENTS ARE TO APPEAR AS SET FORTH IN POST DECREE ORDERS 14 ARE EXTENDED, THE MASTER IS DIRECTED TO PLACE THE ADDITIONAL ADVERTISEMENTS IN THE SAME FORE AND MANNER AS PREVIOUSLY ORDERED THE POST DECREE ORDER ¶ 12, THE PTYS IN ACCORDANCE WITH POST DEC—— ORDER #10 SHALL PAY TO THE

DATE	PROCEEDINGS
1980	
	CLERK ON OR BEFORE 1:00 p.m. 7/21/8 . THE SUMS IN CASHIER'S OR CERTIFIED CHECKS, ETC., FILED. LB
	7/16/80 entered & copies mailed.
997. July 22	CERTIFICATION OF FRANK JENKINS, MASTER RE CERTAIN COSTS & EXPENSES, ETC., FILED.
997. July 22	ORDER DD. 7/22/80 THAT THE REGISTRY OF THE COURT SHALL PAY TO THE OFFICE OF THE MASTER THE AMOUNT OF $4,970.90. THIS AMOUNT COVERS ADDITIONAL ADVERTISING EXPENSES OF THE MASTER'S OFFICE FOR 7/16/80 THROUGH 8/12/80. PAYMENT SHALL BE MADE BY CHECK DRAWN TO THE ORDER OF FRANK W. JENKINS, MASTER, FILED. (TO FISCAL) LB
	7/23/80 entered & copies mailed.
998. July 22	Notice of Appeal of deft. United Engineers & Constructors Inc., nonparty member of the defenant class, filed.
	Certified copy to Clerk, U.S. Court of Appeals with certified copy of docket.
	Copy mailed to: H.B. Newbert, Esq., Apruzzes & McDermott, F.W. Jenkins, M.I. Barish, Esq., J.J. McAleese, Jr., Esq., H.I. Goodman, Esq., K.I. Johnson, Esq., M. Wald, Esq., R.W. Kopp, Esq., M. Hunting, Esq., A.R. Littleton, Esq., J.I. Drew, Esq. & J. Dent, Judge Bechtle.

DATE	PROCEEDINGS
1980	
1000. July 23	Notice of Appeal The Contractors Association of Eastern Pennsylvania the General Building Contractors Association, Inc., the United Contractors Association, the Pennsylvania Exacating Contractors Association and Glasgow, Inc., & Cert. of Service, filed.
	Certified copy mailed to: Clerk, U.S. Court of Appeals with certified copy of docket.
	Copy mailed to: Judge Bechtle, H.B. Newbert, Esq., Apruzzes & McD—— M.I. Barish, Esq., J.J. McAleese, Jr., Esq., H.I. Goodman, Esq., K. I. Johnson, Esq., M. Wald, Esq., R.W. Kopp, Esq., M. Hunting, Esq., A.R. Littleton, Esq., J.I. Drew, Esq. & J. Dent & F.W. Jenkins, Esq.
1002. July 23	Notice of Appeal of the Operating Engineers Joint Appenticeship Training Committee of Philadelphia, Eastern Pennsylvania and the State of Delaware, & Cert. of service, filed. (U.S.C.A. #80-2160)
	Certified copy mailed to: Clerk, U.S. Court of Appeals with certified copy of docket.
	Copy mailed to: Judge Bechtle, H.B. Newbert, Esq., Apruzzes & Mc——— M.I. Barish, Esq., F.W. Jenkins, Esq., J.J. McAleese, Jr., Esq., H.I. Goodman, Esq., K.I. Johnson, Esq., M. Wald, Esq., R.W. Kopp, M. Hunting, Esq., A.R. Littleton, Esq., J.I. Drew, Esq. & J. Dent.

DATE	PROCEEDINGS
1980	
1005. July 24	Notice of Appeal of Local Union 542, International Union of Operating Engineers, & cert. of service, filed. (U.S.C.A. No. 80-2159)
	Certified copy to: Clerk, U.S. Court of Appeals with certified co—— of docket.
	Copies mailed to: H.B. Newbert, Esq., Apruzzes & Dermott, Barish & Gelfond, Esqs., F.W. Jenkins, Esq., J.J. McAleese, Jr., Esq., H.I. Goodman, Esq., K.I. Johnson, Esq., M. Wald, Esq., R.W. Kopp, Esq., M. Hunting, Esq., A.R. Littleton, Esq., J.I. Drew, Esq., J. Dent & Bechtle.
1008. July 25	Notice of Appeal of Bechtel Power Corp. unnamed deft. class member Cert of ——— — to order transcripts etc. & Cert. of Service, filed.
	Certified copy to Clerk, U.S. Court of Appeals with certified copy.
	Copy mailed to: H.B. Newberg, Esq., Apruzzes & McDermott, M.I. Barish, F.W. Jenkins, Esq., J.J. McAleese, Jr., Esq., H.I. Goodman, Esq., K.I. Johnson, Esq., M. Wald, Esq., R.W. Kopp, Esq., M. Hunting, Esq., A.R. Littleton, Esq., J.I. Drew, Esq., J. Dent & Bechtle, J.

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Title Omitted]

EXCERPTED DOCKET ENTRIES

Judge below: LOUIS C. BECHTLE

Date of Judgment:

Notice of appeal filed: June 27. 1980
Commenced in D.C. November 8, 1971

DATE	FILINGS—PROCEEDINGS
1980	
July 28	Certified copy of Notice of Appeal received July 3, 1980, filed.
Aug. 22	Motion by individually named and class appellees, plaintiffs in D.C. Civil No. 71-2698, in which it requests the following relief: (a) leave to consolidate for purposes of disposition on the merits each of the appeals docketed in this Court at Nos. 80-2073, 80-2074, 80-2159, 80-2160, 80-2161, 80-2162 and 80-2163; (b) permitting individually named and class appellees leave to file a single overlength brief in excess of fifty (50) pages to approximately one-hundred and fifty (150) pages; and (c) leave to file said brief within thirty (30) days after service of the last appellant's brief, in which it states that counsel for appellants in each of the seven (7) appeals consent to the granting of this motion, filed. (4cc) Service attached. (Covers 80-2073/4, 80-2159/63)

DATE	FILINGS—PROCEEDINGS
1980	
Aug. 26	Response by appellant in No. 80-2162, United Engineers & Constructors, Inc., to motion by the individually named and class appellees to consolidate appeals and to file a single, overlength brief, in which it states that United has no objection to the motion being granted, with one important caveat, the provision that appellees' brief not exceed one-hundred and fifty (150) pages, filed. (4cc) Service attached. (Covers 80-2073/4 & 80-2159/63)
Aug. 29	Letter dated August 28, 1980 from Gordon Gelfond, Esq., advising that Local 542 will not oppose the individually named and class appellees' motion to consolidate and its request to file a single overlength brief, filed. (Covers 80-2073/4 & 80-2159/63)
Sept. 23	Order (Clerk) granting the motion by individually named and class appellees (filed on 8/22/80); granting the motion by appellants in Nos. 80-2073/4 & 80-2159/61 (filed on 9/8/80); granting the motion by appellee, the Commonwealth of Pennsylvania, (filed on 9/8/80); granting all of the appellants leave to extend the time for filing their briefs and appendices until Oct 20, 1980 and directing that the length of the brief for the class appellees is not to exceed 150 pages, filed. (Covers 80-2073/4 and 80-2159/63)
Oct. 23	First Supplemental Record (Nos. 1065/66), filed. (Covers 80-2073/4 & 80-2159/63 and 81-1065, 81-1181 & 81-1515/5)

DATE	FILINGS—PROCEEDINGS
1980	
Dec. 30	Second Supplemental Record (Nos. 1061/2, 1064, 1068, 1071, 1073/76, 1080, 1083, 1085, 1099/1100, 1102/5, 1107/9 & 1111/12), filed. (Covers 80-2073/4, 80-2159/63 & 81-1065, 81-1181 & 81-1514/5)
1981	
Jan. 21	Third Supplemental Record (Nos. 1114/1115), filed. (Covers 80-2073/4, 80-2159/63, 81-1065 & 81-1181 & 81-1514/5)
Feb. 12	Order (*Weis* & Garth, C.J. & Miller, Assoc. J., Ct. of Customs & Patent Appeals) allotting 45 mins. argument per side & suggesting applts' argument be divided as follows: Intentional liability issues—10 mins.; Vicarious liability issues—15 mins.; Injunctive related cost issues —10 mins. & Class defendant issues—10 mins., filed. (Covers 80-2073/4 & 80-2159/63 No mention made of granting amicus leave to argue.
Feb. 13	Fourth Supplemental Record (Nos. 833 & 1070), filed. (Covers 80-2073/4, 80-2159/63, 81-1065 & 81-1181 & 81-1514/5)
Feb. 24	Argued. Coram: Weis & Garth, C.J. & Miller, Assoc. J., U.S. Ct. of Customs & Patent Appeals. (Court requested counsel to have a transcript prepared of oral argument. (orig. & 3ccs)) (Covers 80-2073/4 & 80-2159/63)
Mar. 3	Transcript of tape of oral argument in this Court on 2/24/81, rec'd at the direction of the Court. (Covers 80-2073/4 & 80-2159/63)
Mar. 5	Order (Seitz, Ch.J., Aldisert, Adams, Gibbons, Hunter, *Weis*, Garth & Sloviter, C.J.) directing the Clerk of Court list this case for rehg. before the Court in banc at the convenience of the Court, filed. (Covers 80-2073/4 & 80-2159/63) SEE AMENDED ORDER FILED 3/11/81.

DATE	FILINGS—PROCEEDINGS
1981	
Mar. 11	Amended Order (Seitz, Ch.J., Aldisert, Gibbons, Hunter, *Weis*, Garth & Sloviter, C.J.)* directing that the Clerk of Court list this case for rehg. before the Court in banc at the convenience of the Court, filed. *Judges Adams & Higginbotham did not participate in the consideration of this matter. (Covers 80-2073/4 & 80-2159/63)
Mar. 16	Fifth Supplemental Record (Nos. 1144 & 1149/1150), filed. (Covers 80-2073/4 & 80-2159/63, 81-1065 & 81-1181 & 81-1514/5)
Apr. 2	Clerk's letter to counsel, written at direction of the Court, re: supplemental briefing (see letter for question). Orig. & 8 ccs of supplemental B. forwarded to the Clerk's office, w/serv. on other counsel. (Cov. 80-2073/4 & 80-2159/63)
Mar. 26	Sixth Supplemental Record, filed. (Cov. 80-2073/4, 81-2159/63, 81-1065, 81-1181 & 81-1514/5)
Apr. 28	Order (*Seitz*, Ch.J., Aldisert, Gibbons, Hunter, Weis & Garth, C.J.) granting request of United Engineers & Bechtel Power for 10 mins. argmt. time as appees on the D.C. allocation of costs in connection with appeals Nos. 80-2073/4, filed. (Cov. 80-2073/4 & 80-2159/63)
May 6	Order (Seitz, Ch.J.) directing reargument time of 1 Hr. for each side; and 10 mins. to United Engineers, et al. as appees on issue—Re: D.C. Allocation of Costs in Nos. 80-2073/4, filed. (Cov. 80-2073/4 & 2159/63)
May 12	Reargued. Coram: Seitz, Ch.J., Aldisert, Gibbons, Hunter, Weis & Garth, C.J. (Cov. 80-2073/4 & 2159/63)

DATE	FILINGS—PROCEEDINGS
1981	
May 19	Opinion Per Curiam (FOR PUBLICATION) (*Seitz*, Ch.J., Aldisert, Gibbons, Hunter, Weis & Garth, C.J.), filed. (Cov. 80-2073/4 & 2161/63)
May 19	Judgment (on rehearing) affirming orders of D.C., w/costs against applts., filed. (Cov. 80-2073/4 & 2161/63)
June 10	Cert. J. in lieu of mandate issued. (Cov. 80-2073/4 & 2161/3)
Aug. 17	Notice—Cert. filed 8/11/81, filed. (S.C. No. 81-280) (Cov. 80-2073/4 & 2161/3)
Aug. 27	Notice—Cert. filed 8/14/81, filed. (S.C. No. 81-330) (Cov. 80-2073/4 & 2161/3)
Aug. 27	Notice—Cert. filed 8/17/81, filed. (S.C. No. 81-333) (Cov. 80-2073/4 & 2161/3)
Aug. 27	Notice—Cert. filed 8/17/81, filed. (S.C. No. 81-332) (Cov. 80-2073/4 & 2161/3)
Aug. 27	Notice—Cert. filed 8/17/81, filed. (S.C. No. 81-331) (Cov. 80-2073/4 & 2161/3)

[Same Docket Entries appear for Numbers 80-2074, 80-2159, 80-2160, 80-2161, 80-2162, and 80-2163]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-2698

COMMONWEALTH OF PENNSYLVANIA

and

RAYMOND WILLIAMS, WILLIE MCKAY, MARION J. EADDY, RANDOLPH HUGHES, JR., AREL BROWNLEE, WILLIAM BOSTIC, KENNETH HOWARD, ALPHA CHRISTMAS, RONALD RICHARDSON, CLARENCE WINDER, RONALD CRAWFORD and FRANK GILCHRIST, on their own behalf and on behalf of all others similarly situated,

Plaintiffs

vs.

LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS; OPERATING ENGINEERS JOINT APPRENTICESHIP AND TRAINING COMMITTEE OF PHILADELPHIA, EASTERN PENNSYLVANIA, and the STATE OF DELAWARE; GENERAL BUILDING CONTRACTORS ASSOCIATION, INC., CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, UNITED CONTRACTORS ASSOCIATION, and PENNSYLVANIA EXCAVATING CONTRACTORS ASSOCIATION, on their own behalf and on behalf of all others similarly situated,

and

GLASGOW, INC., on its own behalf and on behalf of all others similarly situated,

Defendants

CIVIL RIGHTS

COMPLAINT—CLASS ACTION

PRELIMINARY STATEMENT

1. This is a civil action seeking declaratory and injunctive relief, and compensatory and punitive damages, for named and class plaintiffs for intentional violations by the defendants of plaintiffs' constitutional and statutory rights to equal employment opportunities in the construction industry. Specifically, plaintiffs seek remedial relief to enjoin a deliberate past and present course of conduct which discriminates against minority group members in the recruitment, apprenticeship, membership, training, upgrading, referral, and representation of men who work within the operating engineers craft as covered by the territorial jurisdiction of defendant Local 542, International Union of Operating Engineers.

JURISDICTION

2. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1343(3) and (4), this being an action premised upon 42 U.S.C. §§ 1981, 1983, 1985(3), 1988, and 2000(d) *et seq.* (the latter known as Title VI of "The Civil Rights Act of 1964"). Jurisdiction is also invoked pursuant to 42 U.S.C. §§ 2000(e)-5(f), this action being based as well upon 42 U.S.C. §§ 2000(e) *et seq.* (known as Title VII of "The Civil Rights Act of 1964"). Jurisdiction also arises under 28 U.S.C. § 1331 in that the amount in controversy, exclusive of interests and costs, exceeds $10,000 and this action arises under the Constitution and laws of the United States. Jurisdiction is also invoked pursuant to 29 U.S.C. § 185(c) based on violations of the duty of fair representation owed to named and class plaintiffs by defendant Local 542, International Union of Operating Engineers. Plaintiffs also invoke the pendent jurisdiction of this Court to consider claims arising out of the laws of the Commonwealth of Pennsylvania. In addition, declaratory relief is sought pursuant to 28 U.S.C. §§ 2201 and 2202.

3. The named and class plaintiffs have no adequate remedy at law and have suffered, and unless defendants are preliminarily and permanently restrained, will continue to suffer immediate and irreparable harm from the course and conduct of discrimination of which they complain herein.

PARTIES

4. The named plaintiffs are:

(a) The Commonwealth of Pennsylvania which, by its Attorney General, J. Shane Creamer, brings this action on its own behalf and on behalf of its citizens and the named plaintiffs and the class they represent, to secure the rights guaranteed by the laws of the Commonwealth of Pennsylvania and by the Constitution and laws of the United States, made binding on the Commonwealth and its executive officers by virtue of Article VI, Clauses 2 and 3 of the United States Constitution;

(b) Raymond Williams, a Black citizen of the United States, and a resident of the Commonwealth of Pennsylvania, with his residence at 2547 North 12th Street, Philadelphia, Pennsylvania;

(c) Willie McKay, a Black citizen of the United States, and a resident of the Commonwealth of Pennsylvania, with his residence at 2048 Fitzwater Street, Philadelphia, Pennsylvania;

(d) Marion Eaddy, a Black citizen of the United States, and a resident of the Commonwealth of Pennsylvania, with his residence at 4508 Sansom Street, Philadelphia, Pennsylvania;

(e) Randolph Hughes, Jr., a Black citizen of the United States, and a resident of the Commonwealth of Pennsylvania, with his residence at 6253 Old York Road, Philadelphia, Pennsylvania;

(f) Arel Brownlee, a Black citizen of the United States, and a resident of the Commonwealth of Penn-

sylvania, with his residence at 2130 North 20th Street, Philadelphia, Pennsylvania;

(g) William Bostic, a Black citizen of the United States, and a resident of the Commonwealth of Pennsylvania, with his residence at 1210 West Hilton Street, Philadelphia, Pennsylvania;

(h) Kenneth Howard, a Black citizen of the United States, and a resident of the Commonwealth of Pennsylvania, with his residence at 1316 South Divinity Street, Philadelphia, Pennsylvania;

(i) Alpha Christmas, a Black citizen of the United States, and a resident of the Commonwealth of Pennsylvania, with his residence at 540 North Creighton Street, Philadelphia, Pennsylvania;

(j) Ronald Richardson, a Black citizen of the United States, and a resident of the Commonwealth of Pennsylvania, with his residence at 5449 Norfolk Street, Philadelphia, Pennsylvania;

(k) Clarence Winder, a Black citizen of the United States, and a resident of the Commonwealth of Pennsylvania, with his residence at 2322 Catherine Street, Philadelphia, Pennsylvania;

(l) Ronald Crawford, a Black citizen of the United States, and a resident of the Commonwealth of Pennsylvania, with his residence at 2735 North Judson Street, Philadelphia, Pennsylvania;

(m) Plaintiff Frank Gilchrist, a Black citizen of the United States, and a resident of the Commonwealth of Pennsylvania, with his residence at 1016 Mount Vernon Street, Philadelphia, Pennsylvania;

(n) For a complete statement of named individual plaintiffs' claims, *see* their affidavits attached hereto and incorporated by reference.

5. The named defendants are:

(a) Local Union 542, International Union of Operating Engineers (hereinafter "Local 542"), an unincorporated association of workers primarily engaged in the building construction, heavy construction, and highway construction industry. The work jurisdiction of Local 542 includes the Eastern half of the Commonwealth of Pennsylvania and the entire state of Delaware. Defendant Local 542 is a labor organization engaged in an industry affecting commerce within the meaning of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* and the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e), (c), (d), and (e). Its principal office is located at 248 North 12th Street, Philadelphia, Pennsylvania.

(b) Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania, and the State of Delaware (hereinafter "JAC"), a joint labor-management committee within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) 2(d), and an agent of defendant Local 542 as defined in that same Act, 42 U.S.C. § 2000(e) (d). Defendant JAC supervises and administers the apprenticeship program on behalf of defendant Local 542 and the contractor associations with which defendant Local 542 collectively bargains. Defendant JAC has general responsibility for the recruitment, selection, functioning, referral, and graduation of all operating engineer apprentices within defendant Local 542's jurisdiction. Its principal office is located at 323 West Front Street, Media, Pennsylvania.

(c) The General Building Contractors Association, Inc., Contractors Association of Eastern Pennsylvania, United Contractors Association, and Pennsylvania Excavating Contractors Association (hereinafter "contractor association"). These organizations do business within

the Commonwealth of Pennsylvania and are employer associations which have entered into collective bargaining agreements, on behalf of their contractor members, with defendant Local 542 concerning the terms and conditions of employment for operating engineers.

(d) Glaskow, Inc., a contractor-employer subject to the terms of the collective bargaining agreements negotiated by and between defendant Local 542 and defendant contractor associations. Its principal place of business is Willow Grove Avenue and Limekiln Pike, Glenside, Pennsylvania.

CLASS ACTION ALLEGATIONS

6. The named plaintiffs bring this action on their own behalf and on behalf of all others similarly situated, pursuant to Rule 23(a), and (b) (2) of the Federal Rules of Civil Procedure.

(a) As permitted by Rule 23(c) (4) (B) of the Federal Rules of Civil Procedure, the class, as represented by the named plaintiffs, consists of the following subclasses: (i) all minority group members who currently have the skills, when measured by objective standards, of at least a journeyman operating engineer; (ii) all minority group members who are partially skilled, when measured by objective standards, to perform operating engineers work; and (iii) all unskilled minority group members who wish, or may wish, to acquire skills in the operating engineers trade and who are physically capable of acquiring such skills and performing operating engineers work.

(b) As also permitted by Rule 23(c) (4) (B) of the Federal Rules of Civil Procedure, plaintiffs bring this action against a class defined as (i) all contractor associations with whom defendant Local 542 has collective bargaining agreements and (ii) all contractor-employers who are subject to those collective bargaining agreements and who employ operating engineers who are referred to them by defendant Local 542.

(c) Although the exact sizes of plaintiffs' and defendants' classes are unknown, all sub-class members either reside or do business in Eastern Pennsylvania and the State of Delaware, the area encompassing the work jurisdiction of defendant Local 542. The requirements of Rule 23(a)(1) are thus met in that all class members are so numerous that joinder of all members is impracticable.

(d) The representative plaintiff and defendant parties will fairly and adequately protect the interests of their respective classes because, *inter alia*: (i) the named plaintiffs and defendants have the same interests as do the other members of their respective classes; (ii) the named plaintiffs and defendants have no interests herein which are antagonistic to those of the other members of their classes; (iii) the claims of the named plaintiffs and the defenses of the named defendants are typical of the claims and defenses made by the other members of their classes and; (iv) the named plaintiffs will vigorously prosecute this action on behalf of their respective classes.

(e) The following questions of law and fact are common to both plaintiffs' and defendants' classes and predominate over any questions affecting only individual members: (i) whether defendant Local 542 has discriminated, and continues to discriminate against minority group members in the recruitment, apprenticeship, membership, training, upgrading, referral, and representation of men who work within the operating engineers craft as covered by its territorial jurisdiction; (ii) whether defendant JAC has discriminated, and continues to discriminate, against minority group members in the recruitment, selection, and administration of its apprenticeship program; (iii) whether defendants General Building Contractors Association, Inc., Contractors Association of Eastern Pennsylvania, United Contractors Association, Pennsylvania Excavating Contractors Association, and Glaskow, Inc., and all similarly situated

contractor associations and contractor-employers have been and are aware of the above discriminatory practices, have acceded to them, have failed to take reasonable steps, to eliminate them and conspired with all defendants to deprive minority group members of equal employment opportunities in the operating engineers craft.

(f) The parties opposing the plaintiffs' class, the defendants, have acted, or refused to act, on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole and to the sub-classes described in paragraph 6(a).

FACTUAL ALLEGATIONS

The Nature of the Operating Engineers Craft

7. The history of the International Union of Operating Engineers essentially begins in the year 1896 when the National Union of Steam Engineers was formed. During its initial years, the union was largely a tight-knit organization of men who operated stationary steam engines primarily in breweries and in those large commercial buildings which had generating plants of their own.

8. From 1912 until 1927, steam engines were gradually replaced as power sources by electrically powered machines. As this change occurred, the union developed into an organization of mobile machine operators in the construction and building industry. Thus, by 1927, the union which had originally been called the National Union of Steam Engineers, had been renamed the International Union of Operating Engineers.

9. The construction industry remained relatively stable during the depression years but the growth during the period from 1940 until the present has been the most spectacular in the craft's history. During this time billions of dollars, both in the public and private sectors, have been spent on operating engineers work.

10. The need for operating engineers is now greater than ever. Construction activity for the decade 1970-1980 is expected to substantially surpass that of the previous ten years. Automation, which has jeopardized the job security of other construction unions, has provided an expanded job market for operating engineers. The development of nuclear energy has also increased the need for skilled union members. Furthermore, retirements and deaths alone are expected to provide about 5,000 job openings annually in the industry. The dollar volume of construction is enormous and on the increase. For example, for the current fiscal year $72,000,000 is being spent for just highway construction in the five-county Philadelphia area. And $200,000,000 is currently being spent for highway construction in the eastern half of the Commonwealth of Pennsylvania.

11. The benefits to be derived from the operating engineers craft are substantial. Defendant Local 542 has recently concluded an agreement with defendant contractor associations which increases the pay scale of oilers, the lowest paid operating engineer, from $5.24 to $6.69 an hour (effective May 1, 1972) and of steel erectors, the highest paid operating engineer, from $7.61 to $9.72 an hour (also effective May 1, 1972). In terms of annual salary, a typical journeyman operating engineer is quite capable of earning $15,000 to $20,000 per year.

12. Operating engineers work is divided into three primary areas—building construction, heavy construction, and highway construction, Building construction generally includes the building of office buildings, manufacturing plants, sport stadiums, hospitals, theatres, apartments, churches, hotels, courthouses and the like; heavy construction generally includes the building of bridges, airports, subways, tunnels, caverns, dams, irrigation projects, hydroelectric plants, and the excavation and demolition connected therewith; and highway construction includes the

building of the highways, roads, streets, and pipelines which today span the entire United States. The types of equipment operated by operating engineers includes cranes, derricks, hoists, backhoes, scrapers, rollers, tractors, graders, bulldozers and other machines.

The Referral Structure and Organization of Defendant Local 542

13. Defendant Local 542 maintains exclusive hiring halls for the referral of operating engineers to contractors subject to its collective bargaining agreements. Pursuant to these agreements, and to custom and practice developed under them, the union effectively controls and limits virtually all of the employment opportunities available within its territorial jurisdiction. The local is divided into five districts and maintains respective hiring halls in Philadelphia, Reading, Wilkes-Barre, Harrisburg and Wilmington.

14. Local 542 refers men to work by utilizing primarily three priority out-of-work lists which it denotes as Groups I, II and III. Group I is comprised of active journeymen who have attained, within the territorial jurisdiction of Local 542, at least 5,000 hours of work within the past eight years or 2,500 hours within the past three years. Group II is comprised of lesser experienced men who have attained, within the territorial jurisdiction of Local 542, 2,500 hours of work within the past twelve years or 400 hours during the past year. Group III is comprised of all other applicants for employment. Priority referrals are to be made first from Group I and last from Group III. The man with the earliest out-of-work date within each Group is to be referred before any other unemployed operating engineer. Lists reflecting the chrolological placement and removal of men from each list are to be openly available at each hiring hall.

15. Organizationally, Local 542 is divided into a parent body and four branch locals. The parent body, known

simply as Local 542, is composed of full journeyman operating engineers. Branch Local A is composed of oilers and oilers' helpers; Branch Local B is composed of journeymen who operate earth-moving machines; Branch Local C is composed of junkyard, shop, and quarry workers; and Branch Local D is composed of surveyors. In addition, there are operating engineers who have no membership status in Defendant Local 542 but who hold work permits which allow them, upon paying a fee, to be referred to work.

Local 542's History of Discrimination

16. In the early 1900's, when the International Union of Operating Engineers was primarily a stationary engineers organization, the International decided to allow a few Black stationary engineers into the union in order to inhibit the growth of a Black union and to control and limit Blacks' entrance into the craft. However, as the union developed into an operating engineers organization, Blacks, and other minority group members were, by and large, excluded entirely from membership.

17. One method of controlling membership used by Local 542 and other operating engineer unions was the creation of branches affiliated with each local's general parent body (*see* paragraph 15, *supra*). Branch union members have less union rights and less employment opportunities than do parent body members. Thus today, the few minority group members who are permitted to join or get work referrals from defendant Local 542 are primarily centered in the lower-status and lower-paying branch locals A and C or else hold work-permit status in the union.

18. By the 1950's, as a result of this exclusion and control, minority group members comprised less than 1% of defendant Local 542's membership.

19. From 1952 until 1960, defendant Local 542 was placed under the supervision of the International Union of

Operating Engineers. This arose out of a prolonged strike begun by the local in the spring of 1952 when three Philadelphia contractor associations refused to adhere to the terms of a collective bargaining agreement negotiated in April of 1951 between the union and other contractors. Local 542's strike had disastrous effects on the economy of the region and the international was compelled under the circumstances to run the local for the next eight years.

20. During the entire period of international supervision, Blacks and other minority group members were refused union admittance. Those Blacks who already were union members were denied referrals. At that time, when an employer contacted the union for referrals, it meant to send a white man only.

Executive and Congressional Efforts to End Employment Discrimination

21. On July 2, 1964, in order to end employment discrimination in the United States, Congress passed Title VII of the 1964 Civil Rights Act. The Act became effective July 2, 1965 and, in part, prohibited a labor organization from excluding individuals from its membership "because of his race, color . . . or national origin." 42 U.S.C. § 2000(e)-2(c) (1). Also declared unlawful was a labor organization's classification or referral of its members on the basis of "race, color . . . or national origin." 42 U.S.C. § 2000(e)-2(c) (2). Covered as well by Title VII were employers and apprenticeship training committees. 42 U.S.C. § 2000(e)-2(a) (1) and (2) and § 2000(e)-2(d).

22. Since October 27, 1955, the Commonwealth of Pennsylvania has similarly declared the above practices to be illegal through enactment of the Pennsylvania Human Relations Act. *See* 43 P.S. § 951 *et seq.* and the amendments thereto.

23. On September 24, 1965, as a successor to a number of Executive Orders banning discrimination on fed-

erally contracted jobs, President Johnson issued Executive Order 11246. That Order recognized that good intentions and non-discrimination clauses were not enough to end job bias. It required that all parties contracting with the federal government undertake "affirmative action" to ensure equal employment on the jobs created by the federal contract.

The Attempts and Failure to End Local 542's Discrimination

24. In the late fall of 1967, the federal Department of Labor initially developed the Philadelphia Plan as a means of implementing Executive Order 11246 and remedying the exclusion of minority group members from eight selected construction craft unions located in the Philadelphia area. At that time, defendant Local 542 was one of the eight unions to be covered by the Plan and the specific minority group goals established therein.

25. In the spring of 1968, over sixteen million dollars ($16,000,000) in federal funds were withheld from state highway construction as a result of charges that defendant Local 542 was discriminating against minorities. Specifically, the federal government accused the union of excluding minorities or else referring them to less desirable and less lucrative work than was available to similarly situated white operating engineers. By the summer of that year, over thirty-eight million dollars ($38,000,000) had been withheld.

26. In response to the suspension of this federal money, officials of Local 542 reported that there were nine hundred Blacks among its union membership of five thousand men. Philadelphia Sunday Bulletin, April 28, 1968, Section 1, at p. 5 (attached hereto as "Exhibit A").

27. These same figures were reported in 1966 and 1967 to the Office of Federal Contract Compliance (OFCC), the federal agency designated to administer the Philadelphia Plan.

28. It was on the basis of these statistics, and the assurance from Local 542 that it would develop its own "Affirmative Action Program" to assure equal employment opportunities in its craft, that the United States Department of Labor eliminated the operating engineers from inclusion in the Philadelphia Plan order of June 27, 1969.

29. Notwithstanding its 1967 assertions to OFCC of 900 black union members, defendant Local 542 reported to the EEOC in that same year that its five thousand man membership was composed of:

Whites	4350
Blacks	600
Spanish-Surnamed Americans	50
Orientals	0
American Indians	0
Total	5000

30. In its 1968 report to the EEOC, defendant Local 542 indicated that its total membership had risen to six thousand men while its minority group membership had declined to just 193. The representation was:

Whites	5807
Blacks	111
Spanish-Surnamed Americans	14
Orientals	15
American Indians	53
Total	6000

31. In its 1969 report to the EEOC, defendant Local 542 reported that its total membership and its minority group membership were the same as they had been the previous year.

32. Although defendant Local 542's 1970 report to the EEOC is not yet available, plaintiffs allege that the present minority group membership of the union is approximately 3% or less. Of this percentage, a disproportionate number have been assigned to oiler, scrap, and junkyard work (Branch Locals A and C) where the pay

and the opportunity for advancement are significantly less than with other operating engineers work.

33. Based upon the 1970 Census figures, the minority group percentage of the total population of Eastern Pennsylvania and the state of Delaware (the territorial jurisdiction encompassed by Local 542) is approximately 17%. The minority group percentage of the total population for the five-county Philadelphia area—which comprises District I of Local 542's work jurisdiction and includes a majority of its membership—is approximately 20%. In Philadelphia County alone, in which a large number of union members reside, the minority group population is approximately 34%

JAC's History of Discrimination

34. Defendant JAC administers a four year apprenticeship program on behalf of defendant Local 542. It was formed in 1965 and its first class was selected in March of 1966. Defendant JAC is composed of an equal number of union and defendant contractor association representatives.

35. At present, over eighty percent of the members of defendant Local 542 have never been subject to the requirement of entering the apprenticeship program administered by defendant JAC. They had not been subjected to the amalgam of JAC's entry requirements which include age limitations (18-25 year old), written examinations, educational requirements and oral interviews. Nor have they been required to participate in JAC's classroom training which in part emphasizes verbal and writing skills. Most members of defendant Local 542 were hired directly by contractors or placed on the job by the union and learned the necessary skills of the craft by informal on-the-job training.

36. At present, defendant JAC requires virtually all unskilled minority group members who wish entrance

into the craft and membership into the union to attend its apprenticeship program. Yet, because of JAC's controls over entry and indenturship, the number of minority group members in the apprenticeship program is very small. In part, it is through this apprenticeship program that defendant Local 542 seeks to preserve and enhance the job experience and economic advantages gained by its white membership during the period of unregulated nepotistic and racist admission practices which pre-dated the passage of the Civil Rights Act of 1964.

37. Although required by Federal law, defendant JAC did not report its minority group representation to the EEOC in the 1966 to 1968. However, plaintiffs allege that minorities comprised less than 0.5% of the membership in the program at that time.

38. In 1969, based upon reports submitted to the EEOC, there were 232 apprentices in JAC's Apprenticeship program. The statistical breakdown for that year was as follows:

Year of Apprenticeship	Total	Black	Spanish Surnamed Americans	Oriental	American Indians
1st	54	4	0	0	0
2nd	48	1	0	0	0
3rd	82	3	0	0	0
4th	48	0	0	0	0
	232	8	0	0	0

39. Although defendant JAC's 1970 report to the EEOC is not yet available, plaintiffs contend that approximately three percent or less of all present apprentices are minority group members.

40. During the years since the institution of defendant JAC's apprenticeship program, only a handful of minority group members have completed the course and become journeyman operating engineers. In addition, many minority group individuals have been disqualified from entrance into the program because they have "failed" one

or more of the unlawful and unconstitutional requirements imposed upon them by defendant JAC or been victims of its subjective exclusionary practices. Many more have been discouraged and dissuaded from applying because of their knowledge of these unlawful apprenticeship prerequisites and practices. The consequence of this discrimination has been untold unemployment, costly public assistance expense, and frustration and despair among minority groups that have traditionally been locked into a cycle of economic poverty. As this cycle has been perpetuated, the unskilled and partially skilled members of the plaintiffs' class have been, and remain, ready, willing, and able to learn and perform the work required of members of the operating engineers craft.

Defendant Contractor Associations and Contractor-Employers Participation in This Policy and Practice of Discrimination

41. The defendant contractor associations and contractor-employers, having in the past and in the present entered into collective bargaining agreements with defendant Local 542, have sustained and perpetuated the discrimination which is set forth in paragraphs 16 through 33 and which are incorporated herein by reference.

42. The defendant contractor associations and contractor-employers having representatives who partially comprise the membership of defendant JAC, have sustained and perpetuated the discrimination which is set forth in paragraphs 34 through 40 and which are incorporated herein by reference.

43. For a period of time both preceding and following the effective date of Title VII of the 1964 Civil Rights Act, the defendant contractor associations and contractor-employers have had knowledge of the fact that defendant Local 542 and defendant JAC control the entry of substantially all operating engineers into the labor market embraced by Local 542's territorial jurisdiction. They

have also had knowledge of the aforementioned discriminatory practices, have acceded to them, and conspired with defendants Local 542 and JAC to deprive minority group members of equal employment opportunities in the operating engineers craft. Nonetheless, defendant contractor associations and contractor-employers, with the intent of discriminating against plaintiffs and the class they represent, have continued to contract with defendant Local 542 and to participate in the apprenticeship program administered by defendant JAC.

44. From 1952 until 1960, the period during which defendant Local 542 was under international supervision, defendant contractor-employers requested only white operating engineers from the union's hiring halls. Since that time, defendant contractor employers have continued their policy of denying equal employment opportunities to plaintiffs. They have not provided on-the-job assistance to minority group members. They have laid off minority group members while retaining similarily situated white operating engineers. And they have failed to integrate their work forces with minority group members.

45. Defendant contractor associations have made no attempt to correct, modify or disavow the policy and practice of discrimination previously alleged. At the present time, all of these practices continue unchecked despite the availability of minority group individuals ready, willing and able to learn and perform operating engineers work.

The Affirmative Action Agreement of July 17, 1968

46. On July 17, 1968, an agreement establishing an "Affirmative Action Program" was entered into between defendant Local 542 and defendants Contractors Association of Eastern Pennsylvania, United Contractors Association, and Pennsylvania Excavating Contractors Association (a copy of which is attached hereto as "Exhibit B" and incorporated herein by reference). The purpose of this agreement was to eliminate the discrimination of

the past and assure minority group members equal employment and membership opportunities in the operating engineers craft.

47. As a consequence of this agreement, the approval given to it by the Office of Federal Contract Compliance (OFCC), and the earlier statistics reported by union officials (*see* paragraphs 26-30), the United States Department of Labor eliminated the operating engineers from the coverage of the Philadelphia Plan order of June 27, 1969. Furthermore, this agreement freed the thirty-eight million dollars which the federal government had withheld from the operating engineers through the summer of 1968 (*see* paragraphs 24-30).

48. The substance of this "Affirmative Action Program" was divided into two major sections. The first was an agreement to provide unskilled minority group members with an opportunity to enter the operating engineers craft; the second was an agreement to provide semi-skilled and skilled minority operating engineers with an opportunity to train on a variety of equipment so that they could be subsequently upgraded within the craft. (*see* pp. 1-3 of the Agreement).

Operation Benjamin Franklin I

49. In December of 1968, in order to implement its "Affirmative Action Program," and to maintain the approval of OFCC and the Commonwealth of Pennsylvania, defendant Local 542 joined in a journeyman-trainee-training program known as "Operation Benjamin Franklin I." That program was jointly sponsored by the Pennsylvania State Council of the International Union of Operating Engineers, the Pennsylvania contractor associations with whom the operating engineers and collective bargaining agreements, and defendant JAC.

50. The Benjamin Franklin I training program was designed to provide instruction, as heavy equipment op-

erators, for approximately one hundred minority group "ghetto dwellers" who had previously been unemployed or underemployed. It was to be a six-month intensive effort to teach the trainees the various facets of the operating engineers craft. The special feature of the program was the guarantee of referrals and employment for the men who successfully completed the course, the promise of a journeyman's rate of pay, and life-time referrals in the lucrative construction industry. Also promised to successful graduates were union membership in the operating engineers union and the benefits which accrued thereto.

51. Pursuant to the Manpower Development and Training Act, 42 U.S.C. §§ 2583 *et seq.*, Benjamin Franklin I was funded entirely by state and federal monies. The total expenditure was in the sum of approximately seven hundred and twenty-three thousand dollars with more than five hundred thousand dollars coming from the Commonwealth of Pennsylvania and more than two hundred thousand dollars coming from the federal government. These funds were spent on salaries for union instructors, lodging, dining, and allowances for the trainees, costs for the rental of equipment, and a variety of other expenses.

52. From December of 1968 until early June of 1969, approximately one hundred men, the vast majority of whom were Black, took part in Benjamin Franklin I which was conducted at the Resica Falls Boy Scout Reservation in East Stroudsburg, Pennsylvania. These relatively unskilled men came from Philadelphia, Pittsburgh, Harrisburg, Scranton, Reading, Lancaster, and elsewhere in Pennsylvania. While some of the trainees left jobs, others were unemployed at the commencement of the program. During the training, all of them were away from their families, and all sought the lucrative employment opportunities which were available in the operating engineers craft.

53. By the time the training program ended in early June, 1969, the trainees had cleared nearly forty miles

of dirt roads, had dug four lakes, and erected a three-hundred foot suspension bridge, and had excavated land-fills to handle the needs of the site for many years to come.

54. The major intent of Benjamin Franklin I, however, was to provide employment opportunities and union membership to graduating minority group members. It was in these respects that defendant Local 542's pattern and practice of discrimination appeared again.

55. Approximately thirty-seven minority group men returned to Philadelphia in early June, 1969 from East Stroudsburg. None was givn any experience hours credit for the six months of training which they had just undergone. Consequently, each was placed on the lowest, and least desirable, out-of-work list administered by defendant Local 542, i.e., the Group III out-of-work list. In addition, each was compelled to acquire a green operating engineers work permit which allowed him, upon paying a fee, to be referred to work by the union.

56. According to procedures established by defendant Local 542, these Benjamin Franklin I graduates reported to the union's hiring hall to be referred to the work for which they had been trained. Although they reported daily for union referrals, the vast majority of these men were not referred to work at all for almost two months after their graduation.

57. In August, after adverse media publicity depicted this lack of employment, a number of the minority group BenjaminFranklin I graduates began receiving work referrals to a variety of contractor-employers.

58. These work referrals did not, however, result in steady employment nor in union membership. As is more fully set out in the named plaintiffs' affidavits, their employment was of short duration and their jobs were at relatively great distances from their homes. In addition, while many minority group members waited for re-

ferrals, similarly situated whites were being sent out to relatively long lasting jobs, at more convenient locations to their homes, and to select employer-contractors.

59. Today, only a few of these minority Benjamin Franklin I graduates are working as operating engineers. Some are unemployed, some are on public assistance, others have been forced to work at other jobs in order to support themselves and their families. Of those still affiliated with defendant Local 542, none has attained union membership (each still has his work permit); no one has been placed on the union's Group I out-of-work list. In addition, no one has been provided any on-the-job training to insure his development and progress as an operating engineer.

60. Plaintiffs Raymond Williams, Willie McKay, Marion Eaddy, Randolph Hughes, Jr., Arel Brownlee, William Bostic, Kenneth Howard, Alpha Christmas, Ronald Richardson, and Clarence Winder are ten of the Black men who completed Benjamin Franklin I. Their affidavits fully explaining their individual experiences are appended hereto and incorporated by reference.

Operation Benjamin Franklin II

61. Between approximately mid-December of 1969 and early June of 1970, another journeyman-trainee program was conducted in East Stroudsburg, Pennsylvania by defendant Local 542 as part of the requirements of its "Affirmative Action Agreement." That program was called "Operation Benjamin Franklin II" and had the cooperation and participation of defendant contractor associations. It was funded by the federal and state governments pursuant to the Manpower Development and Training Act, 42 U.S.C. §§ 2583 *et seq.* at a sum of five hundred and thirty-nine thousand dollars. Approximately four hundred and twenty thousand dollars came from the Commonwealth of Pennsylvania and one hundred and

nineteen thousand dollars came from the federal government.

62. Training for Benjamin Franklin II paralleled that of Benjamin Franklin I. Approximately seventy men, most of whom were Black, were recruited from Pennsylvania cities to train on a variety of equipment normally run by journeymen operating engineers. They, like their Benjamin Franklin I counterparts, were promised union referrals and employment and union membership as a consequence of their graduation from the program.

63. However, as with Benjamin Franklin I, the promises of defendant Local 542 turned out to be more fanciful than real. For those minorities who graduated the program, none was given any experience hours credit for the six months of training he had just completed. Each was placed on the union's least preferential Group III out-of work list and rather than union membership were compelled to purchase an operating engineers work permit book. While similarly situated whites were referred to steady, convenient jobs with select contractor-employers, the minority group graduates of Benjamin Franklin II were referred to distant and short-time jobs. Moreover, the union's dispatcher did not refer men to work in chrolological order. Minority group operating engineers were often by-passed for whites. In addition, these men neither received on-the-job training nor upgrading from defendant Local 542 or defendant contrator-employers so as to ensure their integration and continual participation in the operating engineers craft.

64. To date, none of the Benjamin Franklin II graduates has been placed on the union's Group I out-of-work list. None has been granted union membership. All still possess union work permits. Many are unemployed and finding it difficult to sustain themselves and their families as operating engineers.

65. Ronald Crawford and Frank Gilchrist are two of the minority group men who completed Operation Ben-

jamin Franklin II. They are plaintiffs in this action. Their affidavits fully explaining their experience are appended hereto and incorporated by reference.

Operation Stepping Stone

66. Pursuant to Part B of its "Affirmative Action Program," defendant Local 542 was required to create and implement a retraining program to enable journeymen, and especially minority group journeymen, to increase their skills on equipment previously unavailable to them. Personal notice of this program was to be sent to all minority group journeymen in defendant Local 542.

67. The program, entitled "Operation Stepping Stone," was conducted in Kaolin, Delaware in two separate six-week training periods beginning respectively in January and March of 1969. The only notice given was by means of a general article in defendant Local 542's newspaper. Contrary to the agreement itself, no personal notice was given any minority group member nor any indication that the program was essentially designed to upgrade minority group journeymen who were members of defendant Local 542.

68. Approximately one hundred journeymen attended Operation Stepping Stone. Of those, two were minority group journeymen.

69. The periodic reviews of Operation Stepping Stone by officials of the Office of Federal Contract Compliance (OFCC) concluded that the program was a total failure, that it failed to increase the numbers of minority group journeymen, that it failed to upgrade minority group journeymen, and that it failed to provide the employment opportunities which implementation of the "Affirmative Action Program" by defendant Local 542 was designed to create (*see* the affidavit of Bennett O. Stalvey, Jr., Regional Director of OFCC appended hereto as "Exhibit C" and incorporated herein by reference).

Apprenticeship Program

70. The final requirement of defendant Local 542's "Affirmative Action Program" was to establish a method of apprenticeship selection to attract minority group members into the operating engineers apprenticeship program.

71. The failure of this program is attested to by the statistics submitted by defendant JAC itself. In 1969, one year after the institution of the agreement, there were eight Blacks out of a total of two hundred and thirty-two participants in the apprenticeship program. There were no Spanish-Surnamed Americans, no Orientals, and no American-Indians in the program at that time. These statistics have not measurably changed in the past two years and indicate that defendant JAC is following the same exclusionary and screening policies it followed in the past.

72. Not only has the Affirmative Action Program not increased the minority group membership in defendant JAC, but the selection procedures utilized to determine entrance have resulted in the disproportionate exclusion of minority group members from the program (*see* paragraphs 35-37). OFCC thus concluded that these selection procedures effectively screen out and discourage minority group applicants from entering JAC's apprenticeship program (*see* "Exhibit C," the affidavit of Bennett O. Stalvey, Jr., incorporated by reference).

THE DECISIONS OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Finding of Discrimination in the Cases of Raymond Williams, Willie McKay and Others Similarly Situated.

73. On June 17, 1969, plaintiffs Raymond Williams and Willie McKay, two Black graduates of the Benjamin Franklin I training program, filed complaints of discrimination against defendant Local 542 with the federal Equal Employment Opportunity Commission (EEOC).

Specifically, plaintiffs Williams and McKay alleged that the union was referring men to work on a discriminatory basis in violation of Title VII of the 1964 Civil Rights Act.

74. After these complaints were deferred for sixty days to the Philadelphia Human Relations Commission, the EEOC thoroughly investigated the matter and on July 17, 1970 its Regional Director concluded that defendant Local 542 had denied referrals not only to plaintiffs Williams and McKay, but also to all similarly situated Blacks, solely on the basis of their race.

75. Defendant Local 542 excepted to this administrative decision. However, on August 30, 1971, the EEOC itself upheld its Regional Director and concluded that (a) Local 542 maintained, and continued to maintain, a hiring hall which discriminated against Blacks because it provided for preferences based upon experience; (b) Local 542 maintained, and continued to maintain, subjective, non-reviewable referral procedures which discriminated against its Black members; and (c) Local 542 refused and continued to refuse, to oppose racial discrimination by potential employers of its Black members (this decision of the EEOC and that of its Regional Director are appended hereto as "Exhibit D" and incorporated by reference).

76. On October 14, 1971 the EEOC wrote plaintiffs Williams and McKay and advised them of their right to initiate suit in the appropriate federal district court (these letters are appended hereto as "Exhibits E-1 and E-2" and incorporated herein by reference).

The EEOC Commissioner's Finding of Discrimination

77. On August 14, 1969, as a result of numerous complaints lodged against defendant Local 542, the EEOC itself initiated a Commissioner's charge of discrimination against the union. During the ensuing months, all of

defendant Local 542's business practices were investigated by the EEOC.

78. On August 6, 1970, the EEOC, as a result of the Commissioner's charge, issued a decision holding that defendant Local 542 had violated Title VII of the 1964 Civil Rights Act by excluding Blacks from the operating engineers craft (this decision is attached hereto as "Exhibit F" and incorporated herein by reference).

79. As found by the EEOC, and as alleged by the plaintiffs, defendant Local 542 has pursued the following deliberate pattern and practice of denying minority group members the equal employment opportunities granted them by state and federal law:

(a) failing and refusing to recruit Blacks and other minority group members for union membership and referrals to jobs on the same basis as whites are recruited.

(b) failing and refusing to admit Blacks and other minority group members into union membership on the same basis as Whites are admitted;

(c) classifying union membership on the basis of race and disproportionately restricting Blacks and other minority group members to branch local A (oilers and oilers' helpers) and branch local C (junkmen and yardmen) thus limiting their financial remuneration and opportunity for advancement within the operating engineers craft;

(d) failing and refusing to refer Blacks and other minority group members to jobs with defendant contractor-employers on the same basis as Whites are referred, by

(i) maintaining invisible and non-reviewable referral procedures, which facilitate discrimination against Blacks and other minority group members,

(ii) giving preference to Whites over Blacks and other minority group members in referrals to jobs,

(iii) consistently referring Blacks and other minority group members to jobs of shorter duration and at greater distances from their homes than jobs to which Whites are referred,

(iv) failing and refusing to refer any Blacks or other minority group members to employment opportunities with certain select defendant contractor-employers while continuing to refer Whites to them, and

(v) perpetuating and exacerbating the effects of past and present discrimination by maintaining out-of-work lists which grant preference in work referrals on the basis of work experience;

(e) failing and refusing to appoint Blacks and other minority group members to master mechanic and assistant master mechanic status and to the special benefits accruing thereto on the same basis as whites are appointed;

(f) failing and refusing to provide upgrading and on-the-job training to Blacks and other minority group members on the same basis as it is provided to Whites;

(g) failing and refusing to represent Black and other minority group union members in their attempts to secure employment opportunities and equal treatment within the union on the same basis as White members are represented; and

(h) concurring and aiding in the discriminatory practices carried out by defendant JAC, contractor associations, and contractor-employers.

80. As also found by the EEOC, and as alleged by plaintiffs, defendant JAC has pursued a deliberate pattern and practice of denying minority group members the equal employment opportunities guaranteed them by state and federal law by

(a) failing and refusing to recruit Blacks and other minority group members for apprenticeship programs on the same basis as Whites are recruited;

(b) failing and refusing to admit Blacks and other minority group members into the apprenticeship program on the same basis as Whites are admitted;

(c) maintaining and applying subjective admission standards as well as standards such as a 25 year old age limitation, a high school diploma or GED requirement, a written examination policy, and a subjective oral interview procedure, each of which in effect discriminates against Blacks and other minority group members because they are not reasonably related to the requirements of operating engineers work;

(d) failing and refusing to provide sufficient on-the-job training for Blacks and other minority group members which are necessary for an apprentice in order to reach journeyman skills;

(e) maintaining and administering a four-year apprenticeship program which is unduly long and disfunctional and which imposes a further barrier to Blacks and other minority group members in their attempts to secure training and experience in the operating engineers craft; and

(f) maintaining subjective, non-reviewable referral procedures, along with defendant Local 542, which discriminate against Blacks and other minority group apprentices in their attempts to obtain work with defendant contractor-employers.

81. All of the defendants have failed to take reasonable steps to eliminate the past and present effects of the above pattern and practice of discrimination. Together, they have engaged in a willful and deliberate conspiracy to deprive Blacks and other minorities of their right to equal employment and membership opportunities within the operating engineers craft.

82. The effect of defendants' acts of discrimination has been to cause plaintiffs to be unemployed, inadequately employed, and dependent upon public assistance despite their availability and readiness to learn and perform operating engineers work.

STATEMENT OF CLAIMS

Count I

83. Plaintiffs reallege the allegations contained in paragraph 7-82.

84. All of the aforementioned acts of the defendants violate 42 U.S.C. § 1981 in that they deprive plaintiffs of "the same right . . . to make and enforce contracts . . . and to [enjoy] the full and equal benefit of all laws for the security of persons and property as is enjoyed by white citizens . . ."

Count II

85. Plaintiffs reallege the allegations contained in paragraph 7-82.

86. All of the aforementioned acts violate 42 U.S.C. § 1983 in that the defendants, acting under color of state law, have deprived plaintiffs of "the rights, privileges, [and] immunities secured by the Constitution and laws" of the United States.

Count III

87. Plaintiffs reallege the allegations contained in paragraph 7-82.

88. All of the aforementioned acts of defendants violate 42 U.S.C. § 1985(3) in that they have been performed as a conspiracy for the purpose of depriving plaintiffs of the equal protection of the laws and of the equal privileges and immunities conferred by the laws of the United States.

Count IV

89. Plaintiffs reallege the allegations contained in paragraph 7-82.

90. All of the aforementioned acts of the defendants violate Title VI of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000(d) *et seq.*, in that they deny plaintiffs on account of their race, color, or national origin the benefits of, and subject plaintiffs to discrimination under, federally financed programs designed to ensure minority group members equal employment opportunities in the operating engineers craft.

Count V

91. Plaintiffs reallege the allegations contained in paragraphs 7-82.

92. All of the aforementioned acts of the defendants violate Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000(e) *et seq.*, in that they discriminate against minority group members on account of their race, color, and national origin in their attempts to secure employment opportunities in the operating engineers craft.

Count VI

93. Plaintiffs reallege the allegations contained in paragraphs 7-82.

94. All of the aforementioned acts of defendant Local 542 violate § 301 of the Labor-Management, Relations Act of 1947, 29 U.S.C. § 185, in that they violate the duty of fair representation owed by the union to its minority group members.

Count VII

95. Plaintiffs reallege the allegations contained in paragraphs 7-82.

96. All of the aforementioned acts of the defendants violate the laws of the Commonwealth of Pennsylvania, and, in particular, the Pennsylvania Human Relations

Act, 43 P.S. §§ 951 *et seq.* and the amendments thereto in that they discriminate against minority group members on account of their race, color, and national origin.

Count VIII

97. Plaintiffs reallege the allegations contained in paragraphs 7-82.

98. All of the aforementioned acts of the defendants violate the Thirteenth Amendment to the United States Constitution in that they subject plaintiffs to involuntary servitude and to the badges and incidents of slavery attendant thereto.

Count IX

99. Plaintiffs reallege the allegations contained in paragraphs 7-82.

100. All of the aforementioned acts of the defendants violate the Fourteenth Amendment to the United States Constitution in that they deprive plaintiffs of the equal protection of the laws and the privileges and immunities granted to citizens of the United States.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that:

1. This court enter a declaratory judgment declaring the aforementioned acts and practices of all of the defendants to be in violation of the Constitution and laws of the United States of America and the laws of the Commonwealth of Pennsylvania.

2. This court issue a preliminary and permanent injunction which would, as to

(A) *All Illegal and Unconstitutional Activities*

Require the defendants, their officers, agents, employees, and successors-in-interest to cease all illegal and

unconstitutional activities against the plaintiffs and members of their class.

(B) *Recruitment and Publicity*

Require the defendants, their officers, agents, employees, and successors-in-interest to undertake a court-approved affirmative action recruitment program directed towards minority group members residing within the work jurisdiction of defendant Local 541. This program shall include a comprehensive publicity campaign to inform minority group members that the defendants' previously employed discriminatory policies and practices have been abandoned and that the defendants now intend to affirmatively correct past discriminatory acts with the implementation of a court approved affirmative action program designed to increase minority group representation within the union. The publicity campaign shall make known the specific elements of the court-approved affirmactive action program. The publicity shall also detail information concerning the procedure for applying for apprenticeship, on-the-job training, referral, and union membership. In addition, the defendants shall disseminate all information concerning recruitment and employment opportunities to the various agencies which primarily serve the minority community within the work jurisdiction of Local 542.

(C) *Apprenticeship Eligibility*

1. Require Local 542, JAC and contractor associations to organize and conduct a court-approved apprenticeship program which shall be devoid of all discriminatory and non-job related eligibility requirements such as, but not limited to:

a. the passage of the current tests being administered by defendant JAC;

b. the requirement that an applicant have a high school or GED degree;

c. the requirement that an applicant be between 18 and 25 years of age; and

d. the requirement of an oral interview.

2. Require that no written examinations for eligibility or membership in the apprenticeship training program shall be utilized until such tests have been validated in accordance with the Equal Employment Opportunity Commission's Guidelines on Testing and then subject to court approval.

3. Require defendant JAC to assure that at least 34% of its next apprenticeship class be minority group men.

(D) *The Operation of the Apprenticeship Program*

1. Require Local 542 and the contractor associations to direct their representatives on JAC to take all necessary steps to ensure that minority group apprentices will be afforded the full range of training opportunities that they require to become a competent journeyman engineer.

2. Require the defendants, their officers, agents, employees and successors in interest to provide on-the-job assistance for all minority group apprentices referred to a union job site during the period of their indenture and specifically to designate a journeyman operating engineer to supervise and provide instruction to minority group apprentices.

3. Require Local 542 and JAC to reduce the period of apprenticeship training from four to three years, at which time an apprentice shall be automatically qualified for journeyman status and admission into the union's parent body.

(E) *Record Keeping in the Apprentice Program*

Require Local 542 and JAC to maintain a special register called the Apprentice Register which shall con-

tain all requests by contractors for referrals of apprentices. The register shall contain the name of the employer, the date and time of the request, the name of the apprentice dispatched, the duration and reason for the termination of the assignment, the type of work performed, and the name of the operating engineer who was responsible for instruction. The register will be maintained at each union hiring hall, be open for public inspection and submitted to the court appointed administrator (*see* below) quarterly for inspection.

(F) *Membership*

1. Require defendant Local 542 to grant to all named and class plaintiffs who have 500 hours of operating engineers experience union membership within Branch "B" of Local 542. Further, in granting union membership to named and class plaintiffs, all Operation Benjamin Franklin I and Operation Benjamin Franklin II graduates will presumptively have acquired 1000 hours of operating engineer experience as a result of training completed. Experience in the operating engineers trade shall include experience in any aspect of the trade which falls under the jurisdiction of defendant Local 542 or any other local union affiliated with the International Union of Operating Engineers. Experience in the operating engineers trade shall also be defined to include experience gained in the armed services, in municipal and other governmental employment training programs sponsored by any of the defendants, and work performed for non-union contractors.

2. Require defendant Local 542 to continue thereafter to admit workers into Local 542 and its branch locals only through the use of objective criteria (i.e., criteria which are directly related to the quantum of skill necessary to perform the quality of work normally performed by operating engineers).

3. Require defendant Local 542 to suspend the admission of all new members into its union except plaintiffs and members of their class until the objective criteria referred to in the previous paragraph are approved by this court.

4. Require defendant Local 542 to admit into its parent body minority group workers who are presently either A or B Branch members, and who have accumulated 1500 hours within the past three years, or 3000 hours within the past eight years.

5. Require defendant Local 542, seven years from the date of this Order, to have within the union a percentage of minority group members equal to the percentage of available minorities as is represented in Local 542's territorial jurisdiction.

(G) *Referrals*

1. Require defendant Local 542 to develop objective criteria and fair procedures to insure the orderly and nondiscriminatory operation of its referral hall. Such criteria and procedures shall be approved by this court.

2. Require defendant Local 542, should it continue to use priority out-of-work groups in the operation of its hiring hall after complying with the above paragraph, to make all work referrals from the Group I out-of-work list in strict chronological order of their date of placement on that list, and then, after names in the Group I list are exhausted, referrals shall be made chronologically from the Group II list, and finally from the Group III out-of-work list.

3. Allow an applicant to be referred out of chronological order if and only if he possesses a special skill and abilities required by a bona fide, written request by a contractor and which special skills and abilities are not possessed by another applicant preceding him on the referral lists. On all occasions when Local 542 refers an individual out of chronological order under this paragraph, notification will be conspicuously posted at all

union hiring halls for all members to see. Notification shall include the name of the individual referred, his race, the special skill or ability he possessed, his out-of-work list number at the time of the referral, and a copy of the written request from the contractor.

4. Require defendant Local 542 to give preferential referrals and defendant contractor associations and its members to give preferential employment so as to insure and guarantee that all named plaintiffs and all graduates from Operations Benjamin Franklin I and II, who are able and so desire to acquire 3000 hours of employment during the next 24 months or acquire work referral hours equal to that worked (on the average) over the past two year period by White operating engineers who have been eligible for referral on the union's Group I out-of-work list, whichever is greater.

5. Require defendants Local 542 and contractor associations to designate an operating engineer or company agent who is to instruct and be responsible for supervising and training minority group graduates from Operation Benjamin Franklin I and II and any other minority group men who experience difficulty on the job to which they have been referred. Employer-contractors shall file reports every thirty days with a court-appointed administrator (*see* below) and plaintiffs' counsel concerning the progress of all minority group members who have received supervision pursuant to this paragraph. Such reports shall include the name of the minority group member who received training and/or assistance, the location at which such supervision took place, the machine or operation for which training was needed, the length of time the minority group person had been working for the contractor, and whether or not the minority group member was laid off. Copies of each individual report shall be given to each minority group member named in the 30-day report.

6. Require that at the end of the 24 months of preferential referrals and employment, all named plaintiffs and all graduates from Operation Benjamin Franklin I and

II be eligible for referrals on the same basis as other union members by applying objective standards for selection and referral of applicants for work which will no longer perpetuate the effects of past discrimination.

7. Require defendant Local 542 to put into its Group I out-of-work list all minority group referral applicants who have 500 or more hours of operating engineer experience; and furthermore, require defendant Local 542 to make preferential referrals and defendant contractor associations and their members to provide preferential employment to all the above minority group members in a minimum annual hourly amount equal to the average hours worked by a White Group I applicant as computed over the past three years.

8. Require defendant Local 542 to put into its Group II out-of-work list all minority group referral applicants who have acquired between 250 and 500 hours of operating engineer experience with mobility into the Group I out-of-work list after the attainment of 500 referral hours; furthermore, require that defendant Local 542 make preferential referrals and defendant contractor associations and its members provide preferential employment to all the above minority group referral applicants so as to insure that each acquires, at a minimum, work in an annual hourly amount equal to the average hours worked by White Group II applicants as computed over the past three years.

(H) *Referral Record Keeping and Reporting*

1. Require the defendants, their officers, agents, employees, and successors-in-interest to adopt a record-keeping procedure which shall have been approved by this court. This shall include, but not be limited to, a requirement that all persons who seek referrals within the operating engineer craft shall sign a serially numbered bound register giving their name, race, address, phone number, date of registration, and _____ of the various operating engineer skills they possess. This application shall then become a permanent part of

the applicant's file and shall be updated, if necessary, upon the subsequent request for referral by the applicant. Local 542 shall place on its out-of-work referral lists, and refer to work, only those persons who have on file such an application and have signed the referral register.

2. Require defendant Local 542 to conspicuously display and make available at each of its hiring halls its out-of-work lists and all records relating to referrals made to operating engineers.

3. Require Local 542 every three months for the next three years to prepare a report to be submitted to this court and to plaitniffs' counsel providing a numerical breakdown by race of the workers within each referral category and its apprenticeship program. This quarterly report shall include the name, address, phone number, date of registration, plus copies of the individual work referral records (which shall include the total number of hours worked, the total amount of wages earned, and the reason for the termination from work).

(I) *Upgrading and On-the-Job Training*

1. Require Local 542 together with the contractor associations to undertake a formal joint training program to assure equal employment opportunity to all minority group employees who desire to acquire the skills required to work on the variety of equipment available within the jurisdiction of Local 542.

2. Require Local 542 to furnish to a court appointed administrator (*see* below) and plaintiffs' counsel the name of each minority group employee working through its hiring hall who requests upgrading or on-the-job training during the reporting period, the date of the request, the action taken on the request, and in the event the request is denied, the reasons therefore.

(J) *Back Pay*

1. Require the defendants to pay compensatory damages, with interest, to all named minority group plain-

tiffs and members of the class they represent, as a result of the aforementioned discriminatory conduct.

(K) *Punitive Damages*

Award to plaintiffs punitive damages for the discrimination they have suffered.

(L) *Court Appointed Administrator*

Appoint an administrator so as to insure adequate enforcement and effective monitoring of any and all remedial relief granted in this action.

(M) *Retention of Jurisdiction*

Allow this court to retain jurisdiction of this action until the defendants have fully complied with this Order.

(N) *Costs and Attorney Fees*

Award to plaintiffs costs and attorney fees incurred in the prosecution of this case.

(O) *Other Relief*

Award such other and further relief as this court may deem just and proper.

J. Shane Creamer, Esquire
Attorney General
Commonwealth of Pennsylvania

Peter W. Brown, Esquire
Deputy Attorney General

Thomas J. Oravetz, Esquire
Deputy Attorney General

Main Capitol
Harrisburg, Pennsylvania 17120

Harold I. Goodman, Esquire
Andrew S. Price, Esquire
Jonathan M. Stein, Esquire
David A. Scholl, Esquire
Harvey N. Schmidt, Esquire

Community Legal Services, Inc.
313 South Juniper Street
Philadelphia, Pennsylvania
19107

Robert J. Reinstein, Esquire
1715 North Broad Street
Philadelphia, Pennsylvania
19122

Nathaniel R. Jones, Esquire
General Counsel
N.A.A.C.P.
1790 Broadway
New York, New York 10012

[Filed November 8, 1971]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

ANSWER OF DEFENDANTS GENERAL BUILDING CONTRACTORS ASSOCIATION, INC., CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, UNITED CONTRACTORS ASSOCIATION, PENNSYLVANIA EXCAVATING CONTRACTORS ASSOCIATION, AND GLASGOW, INC.

Defendants General Building Contractors Association, Inc., Contractors Association of Eastern Pennsylvania, United Contractors Association, and Pennsylvania Excavating Contractors Association (hereinafter called Contractor defendant), by their attorneys, do hereby answer the complaint in accordance with the numbered paragraphs thereof:

1, 2, and 3. Denied.

4(a) through and including 4(n) and 5(a). They are without knowledge or information sufficient to form a belief as to the truth of these averments.

5(b). Denied.

5(c). Denied save that it is admitted that the contractor associations referred to in this portion of the complaint have entered into collective bargaining agreements with defendant Local 542.

5(d). Denied save that it is admitted that the principal place of business of Glasgow, Inc. is Willow Grove Avenue and Limekiln Pike, Glenside, Pennsylvania.

6 and 6(a) through and including 6(f). Denied.

7 through and including 10. They are without knowledge or information sufficient to form a belief as to the truth of these averments.

11. Denied.

12. Admitted.

13 through and including 15. They are without knowledge or information sufficient to form a belief as to the truth of these averments.

16 through and including 20. Denied.

21 and 22. They are without knowledge or information sufficient to form a belief as to the truth of these averments save that it is admitted that on July 2, 1964, the Congress of the United States enacted Title VII of the 1964 Civil Rights Act, which title became effective on July 2, 1965, and that on October 27, 1955, the legislature of the Commonwealth of Pennsylvania enacted the Pennsylvania Human Relations Act.

23. Denied save that it is admitted that on September 24, 1965, Presidential Executive Order 11246 was issued by Lyndon B. Johnson.

24. Denied.

25 through and including 27. They are without knowledge or information sufficient to form a belief as to the truth of these averments.

28. Denied.

29 through and including 33. They are without knowledge or information sufficient to form a belief as to the truth of these averments.

34. Denied.

35. They are without knowledge or information sufficient to form a belief as to the truth of these averments.

36 through and including 44. Denied.

45. Denied save that it is admitted that the Association defendants have made no attempt to correct, modify, or disavow the policy and practice of discrimination

previously alleged in the complaint for the reason that in fact no such policy or practice exists, or ever has existed.

46. Denied save that it is admitted that Exhibit "B" of the complaint is a true and correct copy of a writing describing an affirmative action program undertaken on or about July 17, 1968 by the organizations shown as signatories thereto.

47. Denied.

48. Denied save that it is admitted that the language of Exhibit "B" of the complaint sets forth the substance of the affirmative action program undertaken on or about July 17, 1968.

49 through and including 51. Denied.

52 and 53. They are without knowledge or information sufficient to form a belief as to the truth of these averments.

54. Denied.

55 and 56. They are without knowledge or information sufficient to form a belief as to the truth of these averments.

57 through and including 63. Denied.

64. They are without knowledge or information sufficient to form a belief as to the truth of these averments.

65 through and including 67. Denied.

68. They are without knowledge or information sufficient to form a belief as to the truth of these averments.

69 through and including 72. Denied.

73 through and including 80. They are without knowledge or information sufficient to form a belief as to the truth of these averments.

81. Denied save that it is admitted that the Association and Contractor defendants have not taken steps to eliminate the alleged past and present effects of the pattern and practice of discrimination alleged in the complaint for the reason that in fact no such pattern or practice of discrimination does exist, or ever has existed.

82 through and including 100. Denied.

AFFIRMATIVE DEFENSES

101. This Court lacks jurisdiction over the subject matter of each and every count in the complaint.

102. The complaint fails to state any claim against the Association defendants, or any of them, or the Contractor defendant upon which any relief can be granted to the plaintiff Commonwealth of Pennsylvania.

103. The plaintiff Commonwealth of Pennsylvania does not have standing to bring any claim set forth in any count in the complaint.

104. The complaint fails to state any claim against the Association defendants, or any of them, or the Contractor defendant upon which any relief can be granted to the twelve individual plaintiffs, or any of them.

105. The complaint does not comply with *Fed. R. Civ. P.* 8(a)(2) in that it fails to set forth a short and plain statement that the pleaders, or any of them, are entitled to any relief.

106. Portions of the complaint should be stricken for the reason that they contain matter which is redundant, immaterial, impertinent, and scandalous.

107. The plaintiff Commonwealth of Pennsylvania and each and every individual plaintiff are estopped from making each and every claim for relief set forth in each and every count in the complaint.

108. Each and every claim set forth in each and every count in the complaint is barred because of laches.

109. Each and every claim set forth in each and every count in the complaint is barred by the statutes of limitations.

110. The plaintiff Commonwealth of Pennsylvania and each and every individual plaintiff are not entitled to any relief based upon any claim set forth in the complaint for the reason that they have, and each of them has, waived any right they may have had to any relief.

111. The plaintiff Commonwealth of Pennsylvania and each and every individual plaintiff are not entitled to the declaratory or equitable relief, or any of it, demanded in their complaint, and are not entitled to any judgment for back pay, punitive or any other type of damages, attorneys' fees, or costs.

112. This action is not properly maintainable as a class action.

WHEREFORE, the Association and Contractor defendants request that the complaint, including each and every count therein, be dismissed, that this action be dismissed, and that a judgment be entered for them which includes an award in their favor of a reasonable attorneys' fee and costs.

[Signatures Omitted in Printing]

[Filed December 20, 1971]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

ANSWER OF DEFENDANT GENERAL BUILDING CONTRACTORS ASSOCIATION, INC. TO CERTAIN INTEROGATORIES PROPOUNDED BY PLAINTIFFS

Defendant General Building Contractors Association, Inc. does hereinafter, by providing such information as is available to it, answer those interrogatories in the group 1-20 propounded by plaintiffs in their first set of interrogatories which were not objected to:

ANSWER TO INTERROGATORY 1

The purposes and objectives of the Association are:

A. To make membership in this Association a reasonable assurance to the public of the skill, integrity and responsibility of its members.

B. To maintain the standards of the contracting business at the level commensurate with its character and to establish members of the Association in the public mind as contractors who fulfill obligations in good faith and with consummate skill.

C. To provide an organized means whereby persons engaged in the industry may meet and exchange ideas relative to the industry so that fair dealing and a high standard of business ethics will be developed and fostered.

D. To promote more cordial and cooperative relations between general contractors and those persons with whom they deal, including architects, engineers and other professional groups engaged in the building construction industry.

E. To correct injurious, discriminatory or unfair business methods practiced by or against general contractors.

F. To eliminate waste and reduce cost of construction through every generally accepted means and by every lawful method.

G. To promote safety and accident prevention programs thereby lessening the occurrence of injury or death to persons engaged in construction.

H. To establish standardized contracts and to coordinate such contracts so that the respective interests of owners, general contractors, sub-contractors, manufacturers, dealers, and the public will be protected.

I. To engage in collective bargaining with labor in order to eliminate work stoppages, protect the interests of the public, and promote harmonious relations between employers and employees and to adjust such differences as may arise between them from time to time.

J. To provide a means whereby persons engaged in the building construction industry may meet, fraternize and discuss matters relating to the industry generally.

K. To promote social relations among its members in aid of harmonious relations in the industry.

L. To compile and assemble local statistics relating to the industry, to facilitate the education of apprentices and other personnel engaged or to be engaged in the building construction industry and to educate persons engaged in the building construction industry in more effective use of new materials, techniques and other facilities which will inure to the benefit of the public generally.

ANSWER TO INTERROGATORY 2

The Association was first organized in the year 1724.

ANSWER TO INTERROGATORY 3

The Association was incorporated in 1891 in the Commonwealth of Pennsylvania.

ANSWER TO INTERROGATORY 4

No, the Association is not registered to do business in the Commonwealth of Pennsylvania.

ANSWER TO INTERROGATORY 5

Between the years 1891 and 1944 the Association was known as the Master Carpenters and Building Company of the City of Philadelphia. From 1944 to the present date, the Association has been known as the General Building Contractors Association, Inc.

ANSWER TO INTERROGATORY 6

The present address of the Association is Suite 1212, Two Penn Center Plaza, Philadelphia, Pennsylvania 19102. The telephone number of the Association is (215) LO 8-7015. The Association's office is open Monday through Friday from 9:00 a.m. to 5:00 p.m.

ANSWER TO INTERROGATORY 18

The Association does not have knowledge and information upon which to make the comparison requested by this interrogatory.

CHARLES I. MEHL, being duly sworn according to law, deposes and says that he is the Executive Director of the General Building Contractors Association, Inc., the above defendant, that he is authorized to answer these interrogatories on behalf of defendant, and that the above

answers were derived from such information as is available to the defendant.

/s/ C. I. Mehl
CHARLSON I. MEHL

Sworn to and subscribed before me
this 24th day of Jan. —, 1972.

/s/ Helen P. Hassett
HELEN P. HASSETT
Notary Public
Notary Public, Philadelphia, Philadelphia Co.

My Commission Expires May 26, 1975

[Filed January 25, 1972]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR A DECLARATION OF A CLASS ACTION

The plaintiffs have requested this Court to enter an order that this action shall be maintained as a class action, having a class on the plaintiffs' side of the action and two subclasses on the defendants' side of the action.

With respect to the propriety of a class on the plaintiffs' side of the action, defendants do hereby object to any order that the named plaintiffs represent any class of any description. The grounds and reasons for such objection is amply stated in "Memorandum of Points and Authorities Sur Motion To Dismiss Action, To Strike Certain Matter From Complaint, To Drop Certain Parties Plaintiff, and For Determination This Is Not A Class Action", and defendants do hereby incorporate by reference herein those grounds and reasons.

With respect to the propriety of classes or subclasses on the defendants' side of the action, legal research has revealed that defendant classes or subclasses are indeed rare in federal litigation. Notwithstanding that, and in order to expedite this action at this time, defendants do hereby represent to this Court that they have no objection at this time to the issuance and entry of an interlocutory order, subject to alteration or amendment before a decision on the merits; as authorized by *Fed. R. Civ. P.* 23(c)(1), providing for: a class action with respect to the following issue:

> Whether or not a contractor which is a member of the subclass of contractors defined immediately below is liable to any plaintiff based solely upon the propositions (a) that such contractor is covered by a col-

lective bargaining agreement with International Union of Operating Engineers, Local 542, and (b) that such contractor has employed during the pertinent period, and does employ, three or more operating engineers who are members of the International Union of Operating Engineers, Local 542

for a subclass defined in the following manner:

Contractors which are covered by a collective bargaining agreement with International Union of Operating Engineers, Local 542 and which have employed during the pertinent period, and do employ, three or more operating engineers who are members of the International Union of Operating Engineers, Local 542; and

a class action with respect to the following issue:

Whether or not a contractor association which is a member of the subclass of contractor associations defined immediately below is liable to any plaintiff based solely upon the proposition that such contractor association is a party to a collective bargaining agreement with International Union of Operating Engineers, Local 542

for a subclass defined in the following manner:

Contractor Associations which are parties to a collective bargaining agreement with the International Union of Operating Engineers, Local 542.

If this Court issues an order having contents as outlined above, defendants suggest that appropriate notice be given to the contractors and contractor associations which are members of the subclasses defined. Counsel for the contractor and contractor associations are willing to assist the Court in effecting such notice.

[Signatures Omitted in Printing]

[Filed February 7, 1972]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

ORDER

AND NOW, this 13th day of March, 1972, the following is hereby ORDERED with reference to the above-captioned civil action:

1. Plaintiffs' motion for leave to maintain this action as a class action as to class plaintiffs under F.R.C.P. 23 (b) (2), 28 U.S.C.A. Rule 23 (b) (2), is GRANTED. This action may be maintained as a class action on behalf of the following plaintiff sub-classes:

(a) all minority group members who currently have the skills, when measured by objective standards, of at least a journeyman operating engineer and who work, or may work, within the territorial jurisdiction of defendant Local 542;

(b) all minority group members who are partially skilled, when measured by objective standards, to perform operating engineers work and who work, or may work, within the territorial jurisdiction

(c) all unskilled minority group members who wish, or may wish, to acquire skills in the operating engineers trade and who are physically capable of acquiring such skills and performing operating engineers work within the territorial jurisdiction of defendant Local 542.

2. Plaintiff's motion for leave to maintain this action as a class action as to class defendants under F.R.C.P. 23(b) (2), 28 U.S.C.A. Rule 23(b) (2), is GRANTED. This action may be maintained as a class action against the following defendant sub-classes:

(a) all contractor associations which are, or may be, parties to a collective bargaining agreement with Local 542, International Union of Operating Engineers; and

(b) all contractor-employers who are subject to collective bargaining agreements with Local 542, International Union of Operating Engineers, and who, pursuant to such agreements, employ or will employ operating engineers referred to them by defendant Local 542.

3. The defendants' motion to drop certain parties plaintiff is DENIED.

4. The defendant's motion to drop the Commonwealth of Pennsylvania as a plaintiff is DENIED.

5. The defendant's motion to strike certain matters from the Complaint is DENIED in its entirety.

6. The defendants' motion to strike certain matters from the Prayer for Relief is DENIED in its entirety.

This ORDER, insofar as it grants leave to proceed as a class action as to both plaintiffs and defendants may be modified at any time prior to judgment on the merits.

BY THE COURT:

/s/ A. Leon Higginbotham
A. LEON HIGGINBOTHAM

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

ORDER

AND NOW, this 15th day of MAY, 1972, it is hereby ORDERED that the defendants' motion to dismiss is hereby DENIED.

BY THE COURT:

/s/ A. Leon Higginbotham
A. LEON HIGGINBOTHAM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-2698

IN RE:

COMMONWEALTH OF PENNSYLVANIA
AND RAYMOND WILLIAMS, ET AL.

VS.

LOCAL UNION 542, INTERNATIONAL UNION OF
OPERATING ENGINEERS, ET AL.

LEGAL NOTICE

TO: Those contractor associations who are parties to a collective bargaining agreement with Local 542, International Union of Operating Engineers, and those contractors who are parties or subject to a collective bargaining agreement with, and who employ one or more individuals represented by Local Union 542, International Union of Operating Engineers.

There is pending in this Court a civil action brought by the Commonwealth of Pennsylvania and twelve Black individuals against defendants Local Union 542, International Union of Operating Engineers; Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania, and the State of Delaware; four contractor associations; and one contractor in which it is charged that all defendants discriminated against the twelve Black individuals and all others similarly situated on the grounds of race and color in connection with employment as an operating engineer within the work jurisdiction of Local Union 542. The associations against which this action has been brought are the General Building Contractors Association, Inc.; the Contractors Association of Eastern Pennsylvania; the United Contractors Association; and the Pennsylvania Excavating Contractors Association. The contractor

against which this action has been brought is Glasgow, Inc.

By this action, broad injunctive relief is sought, as well as compensatory and punitive damages.

All charges have been denied.

The contractor associations and the contractor referred to above are represented in this action by the law firm Cunniff, Bray & McAleese, Suite 706, One Wyredith Meeting, Plymouth Meeting, Pennsylvania 19462.

As a result of an order of this Court of March 13, 1973, which designates the subject action as a class action, any judgment therein, whether for or against those against whom the subject action is directed, will apply to the following classes:

(a) all contractor associations which are, or may be, parties to a collective bargaining agreement with Local Union 542, International Union of Operating Engineers; and

(b) all contractor-employers who are subject to collective bargaining agreements with Local Union 542, International Union of Operating Engineers, and who pursuant to such agreements, employ or will employ operating engineers referred to them by Local Union 542.

This notice has been directed to you in the belief that you or your organization may be a member of one of the classes defined above. This notice is not to be understood as an expression of any opinion of this Court as to the merits of any of the claims or defenses asserted by either side in the subject action.

If you have any questions concerning the matter dealt with in this notice, you may address them to:

Clerk, U.S. District Court
Attention: Judge A. Leon Higginbotham, Jr.
9th and Market Streets
Philadelphia, Pennsylvania 19107

or your legal representative.

By the Court:

A. Leon Higginbotham, Jr.

Dated: December 27, 1973.

Philadelphia, Pennsylvania

March 6, 1974

Clerk, U.S. District Court
Attention: Judge A. Leon Higginbotham, Jr.
9th and Market Streets
Philadelphia, Pennsylvania

RE: Commonwealth of Pennsylvania & Raymond Williams, et al. v. Local Union No. 542, International Union of Operating Engineers, et al. Civil Action No. 71-2698

Dear Judge Higginbotham:

We are writing this letter to you as attorneys for United Engineers & Constructors Inc. This Company is a member of several associations which have been joined in the above-entitled matter as members of defendant class. In addition, it operates under collective bargaining agreements between these contractor associations and Local No. 542 of the International Union of Operating Engineers. In your letter of December 27, 1973, it is indicated that Legal Notice is being given that members of the contractor associations will be subject to any judgment rendered in the action. It is our understanding from your letter, that the complaint seeks broad injunctive relief, and punitive, as well as compensatory damages.

Prior to your letter, United Engineers & Constructors Inc. had received no notice of this suit and had not in any way participated in it. For that reason, their knowledge of it is limited to your Notice. It is respectfully requested that the Court instruct plaintiffs to supply the Company with copies of all pleadings, discovery papers, if any, and all other relevant papers which had been generated since the inception of the suit and have passed between the parties. It is necessary for the Company to have copies of these documents so that it may determine what role, if any, it should play in the trial of the case.

At present, not having received any such detailed information concerning the case, it is the position of the Company respectfully held, that it could not appropriately be bound by any judgment against it entered in this case. Moreover, we further respectfully request that no action be hereafter taken affecting the rights of United Engineers & Constructors Inc. until we have received and have had the opportunity to review the above-requested documents.

Respectfully submitted,

MARTIN WALD
For SCHNADER, HARRISON, SEGAL & LEWIS
Attorneys for
United Engineers & Constructors, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

MOTION BY DEFENDANT, BARGER CONSTRUCTION, INC., FOR SUMMARY JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56

Defendant, Barger Construction, Inc., through its attorney, Andrew F. Mimnaugh, Esquire, moves the Court to enter Summary Judgment dismissing it as a Defendant in the above captioned matter based upon the following:

1. Defendant, Barger Construction, Inc. (hereinafter referred to as "Barger"), was joined as a class Defendant (pursuant to FRCP 23(c)(4)(B)) in the above captioned matter, pursuant to Order of the Honorable A. Leon Higginbotham, Jr., District Judge, dated December 27, 1973, as a contractor who is subject to a Collective Bargaining Agreement and who employs one or more operating engineers referred to it and represented by Local Union 542, International Union of Operating Engineers (hereinafter referred to as "Local 542").

2. Defendant, Barger, is a member of the General Building Contractors Association, Inc. and is bound by the Collective Bargaining Agreement governing the wages, terms and conditions of employment which has been entered into with Local 542 during the period relevant to this lawsuit.

3. Defendant, Barger, was joined in this Class Action as stated in Paragraph "6(e)" of the Complaint upon the basis that it has been:

> "aware of the above discriminatory practices, have acceded to them, have failed to take responsible steps to eliminate them and conspired with all Defendants

to deprive minority group members of equal employment opportunities in the operating engineers craft."

4. Defendant, Barger, has not at anytime during the relevant time period involved in this lawsuit used the "hiring hall system" which is the subject of this lawsuit, for referral of operating engineers.

5. Defendant, Barger, during the relevant time period which is the subject of this lawsuit has in fact employed a staff of operating engineers who are members of Local 542 and at least 50% of this staff has been of the negro race, all of which appears in the affidavit attached hereto as "Exhibit A".

WHEREFORE, Defendant, Barger, requests that an Order of this Court be entered dismissing it as a class Defendant since the facts of record disclose that it has not indulged in any of the discriminatory practices which are the subject of this lawsuit, and in fact has achieved an exemplary record in its employment practices, and therefore, the relief as requested in the Complaint either remedial, injunctive, or potential should not be applied to it.

[Signature omitted in printing]

[Filed September 24, 1972]

EXHIBIT "A"

COMMONWEALTH OF PENNSYLVANIA :
: SS
COUNTY OF PHILADELPHIA :

AFFIDAVIT

Your Affiant is WAYNE SNODGRASS, Secretary-Treasurer of Defendant, Barger Construction, Inc., and authorized to make the following statements on behalf of each for the purposes of the encaptioned law suit.

1. I was first employed by Barger in 1953 and have been continuously employed there up to the present time and the foliowing factual statements are made of my personal knowledge.

2. For the period beginning in 1953 and on through March, 1966, Barger did not employ any operating engineers (either members of Local 542, or any other union). Barger operations were conducted on basis of leased equipment and the leases provided operators to be furnished.

3. In March, 1966, Barger obtained, as owner, certain heavy equipment for which the direct employment of an operating engineer was necessary. At that time, Barger promoted an employee, John Glover, to the position of operating engineer. John Glover is a member of Defendant Local 542 and is of the negro race. John Glover, except for periods of normal layoff, has been an employee of Barger continuously up to and including the present date.

4. In May of 1967, Barger Construction Company acquired the assets of Defendant Gentry Contractors, Inc., and at the same time hired two former employees of Gentry, E. Borkowski and J. Borkowski as operating engineers of the equipment which was acquired at that time. E. Borkowski and J. Borkowski were members of

Local 542 and of the caucasian race. E. Borkowski and J. Borkowski, except for periods of normal layoffs, were continuously employed by Barger up to 1972, and in the year 1972 both employees were terminated due to incompetence.

5. In June of 1967, after the acquisition of Gentry, Barger had need for an additional operating engineer and at that time promoted H. L. Bookard who was a member of Local 542 and of the negro race. H. L. Bookard, except for periods of normal layoff, has been continuously employed by Barger up to and including the present time.

6. Barger Construction Company, Inc., has not at any time been involved in either the "JAC" or "Benjamin Franklin" programs which are the subject of this Complaint.

7. Barger Construction, Inc. has not at any time used the hiring hall system which is the subject of this lawsuit for the referral or employment of operating engineers.

Sworn to and subscribed :
:
before me this —— day :
:
of ————————, : /s/ Wayne Snodgrass
: WAYNE SNODGRASS
A. D. 1974. :
:
:
———————— :
Notary Public :

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-2698

COMMONWEALTH OF PENNSYLVANIA
AND RAYMOND WILLIAMS, ET AL.

VS.

LOCL UNION 542, INTERNATIONAL UNION OF
OPERATING ENGINEERS, ET AL.

MEMORANDUM IN SUPPORT [sic] DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The above law suit has as its heart a conspiracy by the Defendant Unions to deprive members of the negro race from membership and employment as operating engineers, and various overt acts are set forth with specificity as to the devices employed to this end.

Employer members of named Trade Associations who bargained with Defendant Unions were made members of the Defendant class because of their having been aware of the discriminatory conduct and failed to take corrective measures.

Defendant Barger is a member of the "Operating Engineers Employers of Eastern Pennsylvania and Delaware" which negotiated the labor agreements as the employer representative with the Defendant Local Union 542.

However, beyond this, as the affidavit of Wayne Snodgrass discloses:

(a) Barger does not use the hiring hall system for the employment of operating engineers, but rather has steadily employed specific union members.

(b) When Barger first had need for an operating engineer it selected a present employee for promotion, who was a member of the negro race.

(c) The next two operating engineers employed by Barger were "inherited" when it acquired the assets of Gentry. These two men were members of Defendant Local 542 and of the caucasian race. Their employment has since been terminated due to incompetence.

(d) The only other operating engineer employed by Barger is also of the negro race.

While the problems with which our federal and state governments are now dealing are older than the governments themselves, the law on this subject is relatively new. The use of statistical analysis and expert opinion based on sociological concepts may be necessary to establish the government's case, in the context of a modern industrial society. However, Defendant Barger's record clearly establishes:

(a) That it has not acceded to any person's discriminatory practices.

(b) That it has taken responsible steps, in that it has acted in a manner which completely refutes any intention to discriminate against persons of the negro race.

(c) That it is free from both participation in any of the overt acts alleged as part of the conspiracy and from obtaining any of the results alleged to be the object of the conspiracy.

The relief sought in the Complaint in the present lawsuit is of an injunctive nature, compensatory nature and punitive nature. Certainly the record of Barger does not require any of these remedies to be applied to it, and stated conversely, the application of these remedies to Barger would be a gross injustice.

[Signature Omitted in Printing]

[Filed September 24, 1974]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

PRETRIAL ORDER NO. 44

ORDER

AND NOW this 3rd day of October, 1975, IT IS ORDERED that the trial in this case shall be bifurcated as follows:

1. When the hearing commences the Court will consider evidence relating to Plaintiffs' claims of racial discrimination by the defendants. After this hearing is concluded, the Court will render judgment on the merits of Plaintiffs' claims and the nature of the relief, if any, to which the individually named and class plaintiffs are entitled. The Court may thereupon order such individual and class relief as is just and proper;

2. If the Court enters judgment on the merits for the plaintiffs, there shall be scheduled, at a time and place to be determined by the Court, a hearing on all claims for specific monetary relief which may be asserted by the individually named and class plaintiffs. The assessment and allocation of such specific monetary relief against the individually named and class defendants will be determined at said hearing.

3. Any class defendant contractor-employer and/or contractor association may be executed from participating in the hearing identified in paragraph #1, *supra*, provided it is willing to stipulate, and does in fact stipulate that

(a) it will be bound by all findings of fact and conclusions of law made by the Court as a result of the hearing identified in paragraph #1, *supra*

and

(b) it will be bound by any relief which may be entered against the defendants as a result of the hearing identified in paragraph #1, *supra*.

BY THE COURT:

/s/ A. Leon Higginbotham
A. LEON HIGGINBOTHAM

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

ORDER

AND NOW, this 16th day of October, 1975, upon consideration of the Motion for Summary Judgment, Docket Entry No. 240, filed on behalf of defendant Barger Construction, Inc. by its attorneys, and it appearing that the instant action involves disputed issues of material fact, it is hereby ORDERED and DECREED that said Motion for Summary Judgment is DENIED.

BY THE COURT:

/s/ A. Leon Higginbotham
A. LEON HIGGINBOTHAM

EXCERPTED TRIAL EXHIBITS

[Exhibit P-691]

3-28-63—Executive Board Minutes

Communications (continued)

The letter was from the General Secretary-Treasurer stating that the Appeal will be considered by the General Executive Board and we will be advised of the time and place when the matter will be considered.

Motion was made by Br. Herrgott seconded by Br. Hargreaves to read this response at all Meetings.

On Vote Call—The Motion passed unanimously.

A lengthy discussion ensued and a Motion was made by Bro. Acchione seconded by Bro. Lattanzio that at the next General Executive Board Meeting, the Business Manager, President, Vice-President and Recording-Corresponding Secretary of Local 542 attend the Meeting to speak for the Executive Board of Local 542 in reference to the Appeal filed by this Board.

Bro. Lattanzio stated he wished to attend at his own cost if he is notified when the meeting is to be held.

Bro. Smith made an amendment to the Motion that "all members of the Board attend the General Executive Board Meeting. Bro. Herrgott seconded the Motion.

On Vote Call—Brothers Smith, Herrgott, Bucklin, Hargreaves, Longacre, Sloane, McCool, Lattanzio and Acchione voted for the amendment. Brothers Adley and Walsh voted against it.
Brothers Lupinacci, Dawson and O'Donoghue abstained.

The Motion carried for the amendment passed.

Brothers Adley and Walsh voted against the amendment because of excessive cost involved.

11. Letter from Bro. Herrgott requesting that Bros. Charles Brumbach # 708094 and Lloyd Rothenberger #629815 to discuss conditions on the job at Fitzwatertown and Moreland Rd. (Correction Exec Bd Meeting 4/25/16—He also requested that Agent Acchione be present.

RECOMMENDATIONS

Harrisburg, Delaware, and all areas submitting suggestions.

Motion was made by Bro. Sloane seconded by Bro. Adley that "all suggestions in reference to the Contract be submitted to the Negotiating Committee for their consideration. This includes those from all areas.

On Vote Call the Motion passed unanimously.

The suggestion of Bro. Yost in Harrisburg, Bro. Clauser in Delaware and the Reading area that a standing vote of Approval (unanimous) in favor of an Australian Ballot be sent to the Executive Board. Wilkes-Barre also took the same action.

It is now recorded in these minutes that the Body present at all area meetings unanimously support this appeal.

Motion was made by Bro. McCool seconded by Bro. Longacre to receive and file.

On Vote Call the Motion passed unanimously.

Motion was made by Bro. Dawson seconded by Bro. Sloane that Group 3 will not be posted in any area.

On Vote Call the Motion passed unanimously.

UNFINISHED BUSINESS

Bro. Adley requested the Minutes to show that at the last Examining Board Meeting there were a lot of men accepted. A lot of those accepted and their getting on jobs was due to some of our members not taking these jobs when offered.

Bro. Adley stated that he recently went on a job and no one checked his book. He suggested all members check books of new men coming on a job if no steward or master mechanic is on the job.

NEW BUSINESS

Bro. Longacre stated that millions of dollars of work has been picked up in Lancaster County due to the action of the Building Trades there. He asked for donations for the Trades Councils in Reading, Harrisburg and York.

Bro. O'Donoghue made a Motion that the Operating Engineers Local 542 pay their proportionate share for the activities with the Building Trades Council from Reading, Harrisburg, York and Lancaster. Bro. Sloane seconded the Motion.

On Vote Call—Motion passed unanimously.

Business Manager Walsh read the demands for the new Contract and explained the proposed changes from the old Contract and also new demands.

NOMINATION PROCEDURES

The proposed Nomination Procedures for Local 542 Officers was read and discussed.

Motion was made and seconded by Bros. Smith and Herrgott respectively to send copies of these procedures to the Membership.

On Vote Call—Motion passed with no objection.

Motion was made by Bro. Smith to adjourn seconded by Bro. Herrgott.

The Meeting adjourned at 11:50 p.m.

/s/ S. F. LUPINACCI

Executive Board Minutes 7-25-63 (continued)

President Gaull and others.

Motion by Bro. C. Longacre
Seconded by Bro. C. Acchione

To pay a day's pay to all officers involved who were present at the bank, but not to those officers on the Union payroll. The payment shall be $35.00 per day now, and in the future.

ON QUESTION:

Bro. Ciavaglia asked, What is a day's pay?
Pres. Dawson said, Standard payment is $35.00 per day.

On Vote Call—Motion approved unanimously.

Motion by Bro. C. Longacre
Seconded by Bro. Smith

That Trustees & Auditors who conducted the balloting for assessments be compensated.

ON QUESTION:

Pres. Dawson said, all officers are expected to be at a Special General Membership Meeting. It's their duty!

Bro. Emrick said, he feels that since he was a Trustee there, he shouldn't get paid. He said, he considered it a part of his job and doesn't want to get paid.

On Vote Call: FOR—Bros. Smith, Duran, C. Longacre, J. Longacre.

AGAINST—Bros. Emrick, O'Donoghue, A. Acchione, C. Acchione, Lattanzio, Walsh, McElhill, Ciavaglia and Convery.

ABSTAINED—Bro. J. D. Thomas.

Motion defeated.

Bus. Mgr. Walsh said, that during negotiations the Contractors were attempting to picture this Local Union as discriminating against the colored people and as a result to disprove this theory, I appointed Al Holland a member of this Local to the negotiating team, and he served on this committee several days and I think he should be compensated for this time.

Motion by Bro. A. Acchione
Seconded by Bro. O'Donoghue

That Bro. Al Holland be compensated for the days he served on the Negotiating Committee.

On Vote Call—Motion approved unanimously.

Bus. Mgr. Walsh spoke on the condition of the agents' cars. He said a few of them were in bad shape and he would like the authority to order needed automobiles.

Motion by Bro. C. Acchione
Seconded by Bro. Thomas

To authorize Bus. Mgr. Walsh to place orders for needed automobiles.

ON QUESTION:

Bro. Ciavaglia asked if the purchase would be through one firm or on a competitive basis.

Bus. Mgr. Walsh explained the advantages and service the Union got from dealing with the Agency from which we purchased the last cars.

On Vote Call—Motion approved unanimously.

Bro. Ciavaglia said, as an officer of the Credit Union, he would like to see some officer of the Credit Union with a key in order to open the Union Offices to Credit Union on Saturday morning.

Motion by Bro. O'Donoghue

Seconded by Bro. Doran, Sr.

To authorize Bro. Ciavaglia of the Credit Union to have a key for this purpose.

On Vote Call—Motion approved unanimously.

Pres. Dawson, Bros. C. Longacre, J. D. Thomas, Convery and Doran discussed Section "L" of the Local Bylaws.

Pres. Dawson suggested we hold this question until we get further clarification on the legal aspects.

Bro. Convery asked about the possibility of getting Welfare Records on individual members.

Pres. Dawson said, we could get this information for the Board if needed.

Bus. Mgr. Walsh said, we had a problem over individual members obtaining information on other members and this causes many problems, and can get to be a sticky situation.

After discussion by Bros. Convery, Dawson, Walsh—It was decided that a rundown on all transfers to the parent body, the records of the Welfare be checked.

Bro. Dawson suggested that the 800 hours required to be in Group I be changed to 2,500 hours as in our present contract, which stated that 2,500 hours are required over three years to be in Group I.

Motion by Bro. J. Longacre
Seconded by Bro. Emrick

That a Committee be appointed to reevaluate our system on qualifications used by the Exam. Board, and that this Committee report back to the Executive Board.

ON THE QUESTION:

Bros. Walsh, J. Longacre, Dawson, Emrick, Doran, O'Donoghue, discussed various proposals to be submitted to this Committee.

On Vote Call—Motion approved.

Minutes of the Regular Executive Board Meeting—Feb. 27, 1964 (continued)

#5—The Secretary read a letter dated Feb. 10, 1964 from Bro. Gerardo Leone, protesting the methods of conducting the election of delegates to the General Convention.

Motion by Bro. O'Donoghue
Seconded by Bro. Convery

To receive and file

On Vote Call—All voted for the motion except Bro. C. Acchione who voted against.

Motion carried.

#6—The Secretary read a letter dated Feb. 12, 1964 from Bro. Gerardo Leone protesting the presiding Chairman's action in refusal to accept his nomination as a candidate for delegate to the General Convention. Bro. Leone's acceptance was by telegram.

Motion by Bro. Convery
Seconded by Bro. O'Donoghue

To receive and file.

On Vote Call—All voted for the motion except Bro. C. Acchione who voted against.

Motion carried.

Bro. Emrick said the Parent Body Charter is specific as to the type of work a Parent Body man can perform. "B" Branch members are by Charter confined to certain type of work; these people work on all types of jobs and they are not paying their fair share.

Bros. J. Longacre, McElhill, C. Acchione, A. Acchione, O'Donoghue, Ciavaglia, Walsh and Dawson discussed the problem at length.

Bro. Doran said the "B" Branch was originally set up for road and sewer work. It was noted that:

1—legal problems were involved.
2—procedural problems were involved.

It was suggested that all questions pertaining to this problem be formulated and forwarded to the Director of Organization, Education and Research of the International Union for answers.

Motion by Bro. Thomas
Seconded by Bro. Emrick

> That the Executive Board recommend to the members to accept Bro. A. Acchione's Bylaw Proposal on the dues increase.

On Vote Call—Motion carried.

Bro. C. Acchione voted against the motion.
Motion by Bro. J. Longacre
Seconded by Bro. Walsh

> That all officers be reimbursed for expenses in performing his official duties.

On Vote Call—FOR: Bros. Thomas, O'Donoghue, Convery, McElhill, J. Longacre, Walsh, Emrick and Smith.

ABSTAINED: Bros. C. Acchione, A. Acchione, Doran, Sr. and Ciavaglia.

AGAINST: Bros. C. Longacre and Lattanzio

Motion carried.

Motion by Bro. McElhill
Seconded by Bro. Smith

> To adjourn

On Vote Call—Motion passed unanimously.

Meeting adjourned at 11:15 p.m.

Respectfully submitted,

/s/ WILLIAM J. MCELHILL
Recording Secretary

SUBJECT TO APPROVAL

[Exhibit P-7]

AFFIRMATIVE ACTION PROGRAM

ATTACHMENT NO. ONE

Agreement between Local Unions 542 and its affiliates, International Union of Operating Engineers, AFL-CIO, and the Contractors Association of Eastern Pennsylvania. Pennsylvania Excavating Contractors Association and the United Contractors Association.

1. Under the provisions of Executive Order # 11246, issued by the President of the United States, and regulations issued under Chapter 60 of Title 41 of the Code of Federal Regulations, as revised, a specific affirmative program must be developed to assure that the employment of workers and the treatment of employees during employment is completely non-discriminatory in regard to race, creed, color or national origin.

2. The parties to this agreement are mutually desirous of developing an affirmative action agreement to implement the provisions of applicable federal regulations in order to assure non-discrimination in employment; upgrading; demotion or transfer; recruitment and recruitment advertising; lay-off or termination; rates of pay and selection for all types of training.

3. The parties to this agreement have made a detailed analysis of employment of minority group workers in the classifications covered by this agreement and have determined that, in the area covered by this agreement, approximately 650 members of Local 542 are minority group members out of a total membership of 5,400.

4. In order to assure non-discrimination, and in an effort to attract a maximum number of potential apprentices from minority groups—now and in the future—the parties to this agreement have formulated the following Affirmative Action Program:

A. *Apprenticeship*

The parties agree to establish a positive program of apprenticeship selection and to use the following program to attract minority groups to the Operating Engineers' Apprenticeship Program:

1. Prepare a program to acquaint interested parties or groups with the nature of the work performed by Operating Engineers.
2. Develop a brochure for distribution to all secondary school counselors, Youth Opportunity Centers, Social Action Agencies and State Employment Offices.
3. Make available visual aids and films, along with speakers to inform and advise high school students and others of opportunities in apprenticeship for Operating Engineers.
4. Form an Advisory Committee from the Joint Apprenticeship and Training Committee to serve Vocational Education Schools by advising on curriculum content, academic emphasis and desirable manipulative skills which should be taught to students desiring to become Operating Engineers.
5. Notify all interested agencies and parties four months prior to the period for taking applications, and making such interested agency or parties aware of the nature of all tests in order to facilitate a proper pre-test educational effort.
6. Provide application forms for apprenticeship and adequate instruction for properly preparing same, upon request, during recruitment periods, at all places and agencies familiar to and customarily used by minority groups.
7. Support interested groups by assisting in a cooperative effort to encourage remedial training in up-

grading the quality and ability of the applicant and develop, in cooperation with the U.S. Department of Labor, an out-reach program for the recruitment and pre-apprenticeship training of individuals from minority groups to enable them to enter the apprenticeship program.

8. To use a standardized, uniform battery of tests to determine applicant proficiency and aptitudes in reading, computation and mechanical skills suitable for the craft of Operating Engineer.

9. Have the test administered by the State Bureau of Employment Security and the Joint Apprenticeship and Training Committee and uniformly and numerically graded.

10. Have all applicants personally interviewed by teams consisting of one representative of Management and one of the Union who shall independently grade each applicant individually and then average the scores. In order to allay any fears on the part of the applicant the interview can and shall, in cooperation with the social action agency or other cooperative agency, take place in places familiar to and customarily used by the applicant.

11. When an applicant fails to achieve acceptance, the Joint Apprenticeship and Training Committee shall make every effort to inform the applicant and the referring or cooperating agency of the area of insufficiency and assist him by referral to the appropriate agency for obtaining remedial studies and join with the agency in encouraging the applicant in using the opportunity to gain acceptance as an Apprentice Operating Engineer.

12. In order for the applicant, after acceptance as an Operating Engineer Apprentice, to become immediately employable by a Participating Employer, the Joint Apprenticeship and Training Committee

shall provide training sites with equipment of the nature for which the Apprentice will be employed, in order to acquaint the Apprentice with safety measures as well as the operation and maintenance of the same and teach him the use of the machine as a tool of the trade and to generate good work habits. After the training, he shall be immediately employed as an "Apprentice-in-training" as such openings occur.

13. The parties to this agreement agree to jointly assist a minority group employee to be integrated into the work force and the Union by:

    a. Having management supervision on the job make every effort to assist and encourage minority group apprentices and to welcome such individuals to the job;

    b. Have each apprentice and pre-apprentice trainee assigned to a Journeyman Operating Engineer for help and assistance; and

    c. Have union officers inform the membership of the importance of making welcome all minority groups into the union.

B. *Journeymen*

1. The parties will undertake a joint training program to assure equal opportunity to all journeymen who desire to acquire the skills required to work on a variety of equipment within the jurisdiction of the Operating Engineers.

2. Local Union officials will notify each minority group member of this program. They will also personally offer to each minority group member an opportunity for training on any construction equipment. If the parties determine that the minority group member lacks adequate pre-

training qualifications, the reasons for such determinations shall be noted in writing and shall be available for inspection during a review of this program by the Office of Federal Contract Compliance and/or the appropriate contracting or administering agency. The availability of such training shall be programmed according to the demands for craftsmen to operate the specific type of equipment involved, but shall in no case be postponed beyond 1969.

3. Each member of the local will be advised of this agreement and the appropriate avenues for redress if any of its terms are breached by either party.

The parties undertake this Affirmative Action Program in accordance with Executive Order 11246. It is their understanding that participation in the program by any contractor shall be accepted in lieu of that portion of a required affirmative action plan which would otherwise be directed to jobs manned by members of the Operating Engineers' union.

The parties shall semi-annually from the date of this agreement, report to the Office of Federal Contract Compliance and the appropriate contracting or administering agency, the progress they have made in meeting the commitments undertaken in this agreement. The report will specifically indicate the total number of minority group individuals in the union, the training each has received and their job assignments (by type of equipment) during the preceding six months. In evaluating these reports, OFCC and the appropriate contracting or administering agency officials will have complete access to relevant records of the parties and will be expected to discuss the progress of the program freely with the parties and union members.

In witness whereof, the parties hereto have executed this Agreement, July 17, 1968.

Local 542 and its affiliates
International Union of
Operating Engineers

/s/ Robert Walsh

/s/ Homer G. Darwin

The Contractors Association of
Eastern Pennsylvania

United Contractors Association

/s/ Harry R. Halloran

/s/ H. G. Minckler

The Pennsylvania Excavating
Contractors Association

/s/ John Buckley, Pres.

[Exhibit P-175]

July 18, 1968

John N. Gentry, Executive Assistant
to the Under Secretary
U.S. Department of Labor
Washington, D.C. 20210

Dear Mr. Gentry:

Enclosed are two copies of the Affirmative Action Program that has been agreed to between the Operating Engineers Local Unions 542, and its affiliates, and our Association. As you will note, two additional Associations are listed. The bargaining for these Associations is handled by our Labor Committee, and as such they are committed to our labor policy.

As part of my work with the Contractors Associations, I am also a member of the Joint Apprenticeship Committee that administers the Operating Engineers Apprenticeship Training. The Committee has already discussed this program and are starting to implement some of the points covered under it.

We would appreciate anything you could do to expedite the approval of the various governmental agencies in approving this program in lieu of the "Philadelphia Plan", so that the construction work that is being held up could be scheduled for bidding and construction.

Very truly yours,

H. G. MINCKLER,
General Manager

[Exhibit P-15]

U.S. DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT COMPLIANCE
Washington, D.C. 20210

July 22, 1968

MEMORANDUM

To: HEADS OF AGENCIES

FROM: Ward McCreedy
Acting Director

SUBJECT: Acceptable Affirmative Action Program for Certain Federally-Involved Contract Construction Projects in Pennsylvania

The Contractors Association of Eastern Pennsylvania, United Contractors Association, and the Pennsylvania Excavating Contractors Association in conjunction with Local Union 542 and its affiliates, International Union of Operating Engineers, AFL-CIO, have committed themselves, beginning this month, to: (1) A positive program of apprenticeship recruitment and selection to attract minority groups to the apprenticeship programs, and (2) A joint training program to provide all journeymen with an opportunity to acquire the skills needed to work on a variety of equipment. With respect to apprentices, the parties will encourage remedial training and, in cooperation with this Department, develop an outreach program. Their Joint Apprenticeship and Training Committee will provide the training sites with the necessary equipment to prepare apprentices for immediate employment as "Apprentices-in-training" as such openings occur. With respect to journeymen, local union officials will personally offer to each of the 650 minority group members an opportunity for training on any highway equipment. This training will be programmed according to the demands for craftsmen but shall in no case be postponed beyond 1969.

This Office recommends that agencies find participation by a bidder in this program constitutes acceptable affirmative action with respect to Operating Engineers. Therefore, a statement of such participation should be accepted in lieu of that portion of a required affirmative action plan which would otherwise be directed to this job category. However, if the low bidder intends to use construction craftsmen in other categories usually described as the mechanical crafts (electrical, ironwork, plumbing, pipefitting, sheetmetal and elevator constructors), the usual determination for affirmative action programs will apply unless similar multi-employer programs have been accepted by this Office.

Throughout this program, this Office will semi-annually evaluate the performance and results to determine whether this program continues to be an acceptable substitute submission for the affirmative action plan with respect to Operating Engineers.

This action has the concurrence of the Department of Transportation. The Philadelphia Federal Executive Board also concurs and has modified the Philadelphia Operating Plan accordingly.

[Exhibit P-176]

U.S. DEPARTMENT OF LABOR
OFFICE OF THE UNDER SECRETARY
Washington, D.C. 20210

July 29, 1968

Mr. Harry R. Halloran
Chairman
Contractors Association of Eastern
Pennsylvania
4026 Chestnut Street
Philadelphia, Pennsylvania 19104

Dear Mr. Halloran:

In response to your telephone call today let me reaffirm that all Federal agencies involved in contract construction projects were informed of the recently concluded agreement between your organization and Local Union No. 542, International Union of Operating Engineers on July 22, 1968.

For your information I am enclosing a copy of a memorandum sent to the heads of agencies by the Acting Director of the Office of Federal Contract Compliance outlining your affirmative action program. I trust this clarifies the matter for your association.

Sincerely,

/s/ John N. Gentry
JOHN N. GENTRY
Executive Assistant to the
Under Secretary

Enclosure

[Enclosure to letter at p. 153]

U.S. DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT COMPLIANCE
Washington, D.C. 20210

July 22, 1968

MEMORANDUM

To: HEADS OF AGENCIES

FROM: Ward McCreedy
Acting Director

SUBJECT: Acceptable Affirmative Action Program for Certain Federally-Involved Contract Construction Projects in Pennsylvania

The Contractors Association of Eastern Pennsylvania, United Contractors Association, and the Pennsylvania Excavating Contractors Association in conjunction with Local Union 542 and its affiliates, International Union of Operating Engineers, AFL-CIO, have committed themselves, beginning this month, to: (1) A positive program of apprenticeship recruitment and selection to attract minority groups to the apprenticeship programs, and (2) A joint training program to provide all journeymen with an opportunity to acquire the skills needed to work on a variety of equipment. With respect to apprentices, the parties will encourage remedial training and, in cooperation with this Department, develop an outreach program. Their Joint Apprenticeship and Training Committee will provide the training sites with the necessary equipment to prepare apprentices for immediate employment as "Apprentices-in-training" as such openings occur. With respect to journeymen, local union officials will personally offer to each of the 650 minority group members an opportunity for training on any highway equipment. This training will be programmed according to the demands for craftsmen but shall in no case be postponed beyond 1969.

This Office recommends that agencies find participation by a bidder in this program constitutes acceptable affirmative action with respect to Operating Engineers. Therefore, a statement of such participation should be accepted in lieu of that portion of a required affirmative action plan which would otherwise be directed to this job category. However, if the low bidder intends to use construction craftsmen in other categories usually described as the mechanical crafts (electrical, ironwork, plumbing, pipefitting, sheetmetal and elevator constructors), the usual determination for affirmative action programs will apply unless similar multi-employer programs have been accepted by this Office.

Throughout this program, this Office will semi-annually evaluate the performance and results to determine whether this program continues to be an acceptable substitute submission for the affirmative action plan with respect to Operating Engineers.

This action has the concurrence of the Department of Transportation. The Philadelphia Federal Executive Board also concurs and has modified the Philadelphia Operating Plan accordingly.

[Exhibit P-219]

THE BIG SCOOP

LOCAL 542 NEWS

VOL. 8 AUGUST, 1968 No. 8

LOCAL SIGNS AFFIRMATIVE ACTION AGREEMENT

During the month of July an "Affirmative Action" Agreement was signed by Business Manager Robert Walsh and President Homer G. Dawson for the Local Union and the various representatives for the Contractors' Associations. This agreement presents a positive plan for training, upgrading and recruitment of minority groups to our Apprentice Training Program. All journeymen, too, will be assured equal opportunity to acquire skills to work or operate a variety of equipment under a retraining program. To date, the following Contractors' Associations have signed the Agreement:

Contractors Association of Eastern Penna.
United Contractors Association
Penna. Excavating Contractors Association
The General Building Contractors Association of Lehigh Valley, Inc.
Wyoming Valley Contractors Association

(Continued on page 2)

BUSINESS MANAGER SPEAKS

After several months of talks, meetings and research, we have come up with what we think is a solution or an answer to the "Philadelphia Plan." We have signed an "Affirmative Action" Agreement with the various Contractors Associations in order to comply with the wishes of the Federal Government in regards to minority groups. We met with General President Hunter P. Wharton and Director of Education and Research Reese Hammond, both of whom were extremely helpful and understanding in our problems regarding the "Phila. Plan." The agreement that we now have is both helpful to the Local Union, the various Contractors' Associations, and it meets the requirements of the Federal Government. Details of the "Affirmative Action" Plan are spelled out in greater detail elsewhere in this paper. We are hopeful that the Federal Government will now release Federal Funds that they were holding up on various Highway Construction Projects and that our membership goes back to full employment. Previously the Government had been demanding that contractors bidding on Federally financed projects guarantee representative numbers of minority groups in each craft classification. The Contractors were unable to do this due to many reasons, such as binding labor contract which contained Hiring Hall clauses, and lack of skilled minority craftsmen, etc. Perhaps this new "Affirmative Action" Agreement will help all of us; the Union Contractors, Minority Groups, and the Federal Government.

Robert Walsh

At this time, I also want to welcome Bro. George "Al" Holland to our staff. Bro. Holland was hired by the Apprentice Training and Retraining Committee as a Special Representative to implement the provisions of the "Affirmative Action" Agreement. Bro. Holland will work under Coordinator Robert Emrick. His job will be to actively go out into the ghetto areas seeking qualified people for training as Operating Engineers. I hope the membership will extend every courtesy to Bro. "Al" Holland and wish him good luck in his endeavors.

The new contract Booklets will be mailed to the members this month and we are hoping to get copies of the new revised International Union of Operating Engineers Constitution into the hands of our members at the same time.

ROBERT WALSH
Business Manager

Note!

District No. 3 Wilkes-Barre Members

The new monthly Meeting Hall for District No. 3 Wilkes-Barre members will be —

AMERICAN LEGION HALL
Post 132
NORTH RIVER STREET
WILKES-BARRE, PA.

This District Meeting is held on the 3rd Thursday of each month, excluding June and December. The old meeting hall is being torn down for an Urban Renewal Project.

APPOINTED

Bro. George "Al" Holland was appointed recently as a Special Representative for Local 542 Apprentice and Retraining Program.

Bro. "Al" Holland has been a member of Local 542 for over 20 years. He is 47 years old and has been an operating engineer practically all his life. His son Curtis Holland, is also a member of Local 542, and he starred in a motion picture made by the Federal Government about Local 542 Apprentice Training Program. Bro. "Al" is a well qualified operating engineer. He worked 3 years as a Master mechanic for C. J. Langenfelder at the Morrisville U. S. Steel Plant ore handling operation. He also served on the negotiating committee several years back. "Al" is well-known and well-liked by his fellow operating engineers. "Al" was hired by the Joint Apprentice Committee to work in accordance with the recently signed "Affirmative Action" Program in the recruitment, training and retraining of minority groups. We know he will do a good job in his new position as "Al" is known to be extremely fair in all his endeavors. We all wish him Good Luck!

[Exhibit P-171]

350 Suburban Station Building,
Philadelphia, Pa. ———

The
CONTRACTORS ASSOCIATION
of Eastern Pennsylvania

[SEAL]

Bulletin

68-66

August 7, 1968

EQUAL EMPLOYMENT

Enclosed for your information and review is a copy of the Affirmative Action Program recently negotiated and settled between this Association and Local 542 of the Operating Engineers. The Office of Federal Contract Compliance, Department of Labor, charged with the administration and enforcement of the Executive Order 11246 that established affirmative action programs, recently announced its approval and notified all other Federal Agencies of the program. The OFCC recommended that all agencies find participation by a bidder in this program to constitute an acceptable affirmative action program. This approval to cover all work except where mechanical crafts (such as electrical, iron worker, plumber, pipefitter, sheet metal worker, roofer or elevator constructor) are involved. In case the services of these other crafts are required—call this office since there is a possibility of future changes in connection with these crafts. A statement that you are a member of this Association and therefore a participant in the program will be accepted in lieu of the required affirmative action program developed for this area by all contracting agencies. In other words, this program will negate any requirement for a pre-award conference and a manning table unless the use of the mechanical trades are contemplated.

The U. S. Department of Transportation and the Pennsylvania Department of Highways have concurred in and approved this program. The Philadelphia Federal Executive Board composed of the local heads of Federal Agencies and originators of the 'Philadelphia Plan', have also approved this program and have modified the 'Plan' accordingly.

If you are low bidder on any work where the Equal Employment specifications are involved and affirmative action programs are requested—please contact this office, we will work with you on it since the development of these programs is so critical to the whole industry at this time.

PDR—PREQUALIFICATION PART III

All contractors, who are prequalified with the Highway Department, have received Part III of Form 4300 for completion. The mechanics of being pre-qualified for all three (3) parts of this form require you to complete Part III and forward it to the Department before *September 1st.* Please complete the form with your company name where appropriate and have it notarized.

To clarify completion:

Item #1 on the form requires attaching a *signed* statement on your letterhead as Exhibit "A", this statement should be along the following lines:

> We, the undersigned as a member of The Contractors Association of Eastern Pennsylvania, subscribe to and participate in the plan executed between the Association and Local Union 542 and its affiliates, International Union of Operating Engineers.

It is *not* necessary to file a copy of the enclosed program with Part III—the Association will furnish copies to the Department along with our membership list.

Item #2 requires the naming of your company Equal Employment Policy Officer. This individual should be a responsible top management person capable of discussing the various questions arising on equal employment with government personnel.

The other items on the form do not require any further action *at this time* but keep in mind the procedures that you have agreed to follow in the future by the filing of this form. They are obligatory on your part and will be reviewed periodically, in depth, by the Department and the Bureau of Public Roads.

If you have any questions—please contact this office.

/s/ A. A. ANTONUCCI
Executive Secretary

ABA/1ap
Attachment

[Exhibit P-198]

Agreement made this 13th day of August 1968, as of July 17, 1968, by and between Local Union 542 and its affiliates, International Union of Operating Engineers, AFL-CIO, the Contractors Association of Eastern Pennsylvania, the Pennsylvania Excavating Contractors Association and the United Contractors Association (parties of the first part) and General Building Contractors Association, Inc. (party of the second part).

WITNESSETH:

WHEREAS, the parties of the first part have entered into an agreement dated July 27, 1968 entitled "Affirmative Action Program", a copy of which agreement is attached hereto, made a part hereof and marked Exhibit A; and

WHEREAS, the party of the second part desires, in its territory and work jurisdiction, to join in said agreement as a party thereto; and

WHEREAS, the parties of the first part are agreeable to such joinder.

NOW, THEREFORE, in consideration of the terms and conditions hereof, and intending to be legally bound hereby, the parties hereto agree as follows:

1) Effective as of July 17, 1968, the General Building Contractors Association, Inc. is and shall be a party, in its territory and work jurisdiction, to an agreement designated "Affirmative Action Program" attached hereto, made a part hereof and marked Exhibit A, to which agreement Local Union 542, and its affiliates, International Union of Operating Engineers, AFL-CIO, the Contractors Association of Eastern Pennsylvania, the Pennsylvania Excavating Contractors Association and the United Contractors Association are parties, in the same manner and with the same effect as if the General Build-

ing Contractors Association, Inc. had executed said agreement dated July 17, 1968 concurrently with said parties of the first part.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their duly authorized representatives as of the day and year first above written.

Local 542 and its affiliates, International Union of Operating Engineers

/s/ Robert Walsh

/s/ Homer G. Darwin

The Contractors Association of Eastern Pennsylvania

United Contractor Association

/s/ Harry R. Halloran

/s/ H. G. Minckler

The Pennsylvania Excavating Contractors Association

/s/ John Buckley, Pres.

General Building Contractors Association, Inc.

/s/ Harry P. Taylor

[Exhibit P-16]

U.S. DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT COMPLIANCE
Washington, D.C. 20210

August 26, 1968

MEMORANDUM

To: HEADS OF AGENCIES

FROM: Ward McCreedy
Acting Director

SUBJECT: Acceptable Affirmative Action Program for Certain Federally-Involved Contract Construction Projects in Pennsylvania

The General Contractors Association of Wyoming Valley, in conjunction with Local Union 542 and its affiliates, International Union of Operating Engineers, AFL-CIO, have committed themselves, beginning July 31, 1968, to: (1) A positive program of apprenticeship recruitment and selection to attract minority groups to the apprenticeship programs, and (2) A joint training program to provide all journeymen with an opportunity to acquire the skills needed to work on a variety of equipment. With respect to apprentices, the parties will encourage remedial training and, in cooperation with this Department, develop an outreach program. Their Joint Apprenticeship and Training Committee will provide the training sites with the necessary equipment to prepare apprentices for immediate employment as "Apprentices-in-training" as such openings occur. With respect to journeymen, local union officials will personally offer to each of the 650 minority group members an opportunity for training on any highway equipment. This training will be programmed according to the demands for craftsmen but shall in no case be postponed beyond 1969.

This Office recommends that agencies find participation by a bidder in this program constitutes acceptable affirmative action with respect to Operating Engineers. Therefore, a statement of such participation should be accepted in lieu of that portion of a required affirmative action plan which would otherwise be directed to this job category. However, if the low bidder intends to use construction craftsmen in other categories usually described as the mechanical crafts (electrical, ironwork, plumbing, pipefitting, sheetmetal and elevator constructors), the usual determination for affirmative action programs will apply unless similar multi-employer programs have been accepted by this Office.

Throughout this program, this Office will semi-annually evaluate the performance and results to determine whether this program continues to be an acceptable substitute submission for the affirmative action plan with respect to Operating Engineers.

This action has the concurrence of the Department of Transportation.

[Exhibit P-143]

U.S. DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT COMPLIANCE
Washington, D.C. 20210

October 9, 1968

MEMORANDUM

TO: HEADS OF AGENCIES

FROM: Ward McCreedy
Acting Director

SUBJECT: Acceptable Affirmative Action Program for Certain Federally-Involved Contract Construction Projects in Pennsylvania

The General Building Contractors Association, Inc., in conjunction with Local Union 542 and its affiliates, International Union of Operating Engineers, AFL-CIO, have committed themselves to: (1) A positive program of apprenticeship recruitment and selection to attract minority groups to the apprenticeship programs, and (2) A joint training program to provide all journeymen with an opportunity to acquire the skills needed to work on a variety of equipment. With respect to apprentices, the parties will encourage remedial training and, in cooperation with this Department, develop an outreach program. Their Joint Apprenticeship and Training Committee will provide the training sites with the necessary equipment to prepare apprentices for immediate employment as "Apprentices-in-training" as such openings occur. With respect to journeymen, local union officials will personally offer to each of the 650 minority group members an opportunity for training on any highway equipment. This training will be programmed according to the demands for craftsmen but shall in no case be postponed beyond 1969.

This Office recommends that agencies find participation by a bidder in this program constitutes acceptable affirmative action with respect to Operating Engineers. Therefore, a statement of such participation should be accepted in lieu of that portion of a required affirmative action plan which would otherwise be directed to this job category. However, if the low bidder intends to use construction craftsmen in other categories usually described as the mechanical crafts (electrical, ironwork, plumbing, pipefitting, sheetmetal and elevator constructors), the usual determination for affirmative action programs will apply unless similar multi-employer programs have been accepted by this Office.

Throughout this program, this Office will semi-annually evaluate the performance and results to determine whether this program continues to be an acceptable substitute submission for the affirmative action plan with respect to Operating Engineers.

The Philadelphia Federal Executive Board concurs in this action and has modified the Philadelphia Operating Plan accordingly.

[Exhibit P-30]

January 8, 1969

Mr. Ben Stalvey
Office of Federal Contract Compliance
1537 Western Saving Fund Building
Philadelphia, Pennsylvania 19107.

Dear Mr. Stalvey:

In accordance with your request this is to confirm my best approximation that Local 542, Operating Engineers, has about 5,500 members, and that there are about 350 minority. I caution you that this is a guess which may be way off as to the number of minority members. In order to better satisfy various inquiries which have been made concerning the number of minority members, the local union has sent out questionnaires to all of the members asking that they state whether they belong to a minority (listed) and, if so, which minority. I do not expect to have replies in on this until late this month.

As of October 1, 1968, the Local 542 Apprenticeship Program had 233 apprentices in all districts, and, of these, five were minority persons.

However, the above apprenticeship program figures do not include those minority persons who are included in the recent group of 100 hard core unemployed men who were sent upstate in mid-December to be trained in heavy equipment operation at Resica Falls. Most of these men were Negroes. I point out to you that these men were, for one reason or another, mainly age, not eligible for the formal apprenticeship training program. They will be trained to operate at least one machine, and it is expected that they will be operators in every sense of the word, although they did not go through the formal apprenticeship training program.

I enclose copy of a clipping from the "Pocono Record" of December 17, 1968, which sets forth much of the in-

formation concerning this program. The union calls this program "Project Benjamin Franklin". This is an ambitious undertaking, the result of an aggressive position taken by the Operating Engineers and the Apprenticeship Program. The Montgomery County Council, Boy Scouts of America, have a camp at Resica Falls, which requires much heavy construction work. At this site, the Boy Scouts will provide necessary administration and classroom space and equipment free of charge. We have arranged for the men to live at a resort club nearby, where they will have living facilities, including maid service, and dining and kitchen facilities. A restaurant chain, the Dutch Kitchen, will cater all of the meals on the premises. This project is to continue into the beginning of June 1969, at which time the Boy Scout camp will then be used for summer encampments. Of course, the resort club will then also be in season, so that the living quarters provided will be otherwise occupied.

We feel that this project is a small but excellent start on what we hope to be a very broad and aggressive program. We know that the goal of your office cannot really be achieved until this training takes place.

If you desire any more information about which you telephoned me, please do not hesitate to get in touch with me. I will advise you when we have a better idea as to the above figures.

Sincerely yours,

Freedman, Borowsky and Lorry
By /s/ [Illegible]

[Exhibit P-207]

The

CONTRACTORS ASSOCIATION

of Eastern Pennsylvania

[SEAL]

March 18, 1969

SUBJECT: OPERATION BEN FRANKLIN
Officers, Board of Directors and Labor Committees

Attached is photocopy of letter from the Pennsylvania State Council, International Union of Operating Engineers regarding the OPEN HOUSE program for various contractors' organizations to be held on MONDAY, MARCH 24, 1969. The day's activities will start at 10:00 A.M. from VACATION VALLEY LODGE on Route 209, six miles north of Marshalls Creek.

We feel it is important that a good representation attend this function both from an individual and company standpoint as well as on behalf of this Association. Since Operation Ben Franklin is an important segment of the Affirmative Action Program and many high, important officials will be attending, your presence will evidence our desire to cooperate and participate therein.

Be sure to advise James S. Longacre, Executive Director, 829 State Road, Lemoyne, Pa. 17043, Phone: (717) 737-7963, and this office, of your intention to attend so

that transportation and luncheon arrangements can be made.

by /s/ A. A. Antonucci
A. A. ANTONUCCI
Executive Secretary

[Exhibit P-37]

U.S. DEPARTMENT OF LABOR
OFFICE OF THE ASSISTANT SECRETARY
Washington, D.C. 20210

June 27, 1969

[SEAL]

MEMORANDUM

To: HEADS OF ALL AGENCIES

FROM: Arthur A. Fletcher
Assistant Secretary for Wage and Labor Standards

SUBJECT: Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction

1. *Purpose*

The purpose of this Order is to implement the provisions of Executive Order 11246, and the rules and regulations issued pursuant thereto, requiring a program of equal employment opportunity by Federal contractors and subcontractors and Federally-assisted construction contractors and subcontractors.

2. *Applicability*

The requirements of this Order shall apply to all Federal and Federally-assisted construction contracts for projects the estimated total cost of which exceeds $500,-

000, in the Philadelphia area, including Bucks, Chester, Delaware, Montgomery and Philadelphia counties in Pennsylvania.

3. *Policy*

In order to promote the full realization of equal employment opportunity on Federally-assisted projects, it is the policy of the Office of Federal Contract Compliance that no contracts or subcontracts shall be awarded for Federal and Federally-assisted construction in the Philadelphia area on projects whose cost exceeds $500,000 unless the bidder submits an acceptable affirmative action program which shall include specific goals of minority manpower utilization, meeting the standards included in the invitation or other solicitation for bids, in trades utilizing the following classifications of employees:

Iron workers
Plumbers, pipefitters
Steamfitters
Sheetmetal workers
Electrical workers
Roofers and water proofers
Elevator construction workers

4. *Findings*

Enforcement of the nondiscrimination and affirmative action requirements of Executive Order 11246 has posed special problems in the construction trades. Contractors and subcontractors must hire a new employee complement for each construction job and out of necessity or convenience they rely on the construction craft unions as their prime or sole source of their labor. Collective bargaining agreements and/or established custom between

construction contractors and subcontractors and unions frequently provide for, or result in, exclusive hiring halls; even where the collective bargaining agreement contains no such hiring hall provisions or the custom is not rigid, as a practical matter, most people working in these classifications are referred to the jobs by the unions. Because of these hiring arrangements, referral by a union is a virtual necessity for obtaining employment in union construction projects, which constitute the bulk of commercial construction.

Because of the exclusionary practices of labor organizations, there traditionally has been only a small number of Negroes employed in these seven trades. These exclusionary practices include: (1) failure to admit Negroes into membership and into apprenticeship programs. At the end of 1967, less than one-half of one percent of the membership of the unions representing employees in these seven trades were Negro, although the population in the Philadelphia area during the past several decades included substantial numbers of Negroes. As of April 1965, the Commission on Human Relations in Philadelphia found that unions in five trade (plumbers, steamfitters, electrical workers, sheet metal workers and roofers) were "discriminatory" in their admission practices. In a report by the Philadelphia Local AFL-CIO Human Relations Committee made public in 1964, virtually no Negro apprentices were found in any of the building trades classes;[1] (2) failure of the unions to refer Negroes for employment, which has resulted in large measure from the priorities in referral granted to union members and to persons who had work experience under union contracts.

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[1] Marshall and Briggs, *Negro Participation in Apprenticeship Programs* (Dec. 1966), pg. 91.

On November 30, 1967, the Philadelphia Federal Executive Board put into effect the Philadelphia Pre-Award Plan. The Federal Executive Board found that [2] the problem of compliance with the requirements of Executive Order 11246 was most apparent in Philadelphia in eight construction trades: electrical, sheetmetal, plumbing and pipefitting, steamfitting, roofing and waterproofing, structural iron work, elevator construction and operating engineers; and that local unions representing employees in these trades in the Philadelphia area had few minority group members and that few minority group persons had been accepted in apprenticeship programs. In order to assure equal employment opportunity on Federal and Federally-assisted construction in the Philadelphia area, the plan required that each apparent low bidder, to qualify for a construction contract or subcontract, must submit a written affirmative action program which would have the results of assuring that there will be minority group representation in these trades.

Since the Philadelphia Plan was put into effect, some progress has been made. Several groups of contractors and Local 543 [sic] of the International Union of Operating Engineers have developed an area program of affirmative action which has been approved by OFCC in lieu of other compliance procedures, but subject to periodic evaluation. The original Plan was suspended because of an Opinion by the Comptroller General that it violated the principles of competitive bidding.

Equal employment opportunity in these trades in the Philadelphia area is still far from a reality. The unions in these trades still have only about 1.6 percent minority

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[2] These findings were based on a detailed examination of available facts relating to building trades unions, area construction volume and demographic data.

group membership and they continue to engage in practices, including the granting of referral priorities to union members and to persons who have work experience under union contracts, which result in few Negroes being referred for employment. We find, therefore, that special measures are required to provide equal employment opportunity in these seven trades.

In view of the foregoing, and in order to implement the affirmative action obligations imposed by the equal employment opportunity clause in Executive Order 11246, and in order to assure that the requirements of this Order conform to the principles of competitive bidding, as construed by the Comptroller General of the United States, the Office of Federal Contract Compliance finds that it is necessary that this Order, requiring bidders to commit themselves to specific goals of minority manpower utilization, be issued.

5. *Acceptability of Affirmative Action Programs*

A bidder's affirmative action program will be acceptable if the specific goals set by the bidder meet the definite standards determined in accordance with Section 6 below. Such goals shall be applicable to each of the designated trades to be used in the performance of the contract whether or not the work is to be subcontracted. However, participation in a multi-employer program approved by OFCC shall be acceptable in lieu of a goal for the trade involved in such training program. In no case shall there be any negotiation over the provisions of the specific goals submitted by the bidder after the opening of bids and prior to the award of the contract.

6. *Specific Goals and Definite Standards*

a. *General.* The OFCC Area Coordinator, in cooperation with the Federal contracting or administering agen-

cies in the Philadelphia area, will determine the definite standards to be included in the invitation for bids or other solicitation used for every Federally-involved construction contract in the Philadelphia area, when the estimated total cost of the construction project exceeds $500,000. Such definite standards shall specify the range of minority manpower utilization expected for each of the designed trades to be used during the performance of the construction contract. To be eligible for the award of the contract, the bidder must, in the affirmative action program submitted with his bid, set specific goals of minority manpower utilization which meet the definite standard included in the invitation or other solicitation for bids unless the bidder participates in an affirmative action program approved by OFCC.

b. *Specific Goals.*

1) The setting of goals by contractors to provide equal employment opportunity is required by Section 60-1.40 of the Regulations of this Office (41 CFR § 60-1.40). Further, such voluntary organization of businessmen as Plans for Progress have adopted this sound approach to equal opportunity just as they have used goals and targets for guiding their other business decisions (See the Plans for Progress booklet Affirmative Action Guidelines on page 6.)

2) The purpose of the contractor's commitment to specific goals is to meet the contractor's affirmative action obligations and is not intended and shall not be used to discriminate against any qualified applicant or employee.

c. *Factors Used in Determining Definite Standards.* A determination of the definite standard of the range of minority manpower utilization shall be made for each

better-paid trade to be used in the performance of the contract. In determining the range of minority manpower utilization that should result from an effective affirmative action program, the factors to be considered will include, among others, the following:

1) The current extent of minority group participation in the trade.

2) The availability of minority group persons for employment in such trade.

3) The need for training programs in the area and/or the need to assure demand for those in or from existing training programs.

4) The impact of the program upon the existing labor force.

7. *Invitation for Bids or Other Solicitations for Bids*

Each Federal agency shall include, or require the applicant to include, in the invitation for bids, or other solicitation used for a Federally-involved construction contract, when the estimated total cost of the construction project exceeds $500,000, a notice stating that to be eligible for award, each bidder will be required to submit an acceptable affirmative action program consisting of goals as to minority group participation for the designated trades to be used in the performance of the contract—whether or not the work is subcontracted. Such notice shall include the determination of the range of minority group utilization (described in Section 6 above) that should result from an effective affirmative action program based on an evaluation of the factors listed in Section 6c. The form of such notice shall be substantially similar to the one attached as an appendix to

this Order. To be acceptable, the affirmative action program must contain goals which are at least within the range described in the above notice. Such goals must be provided for each designated trade to be used in the performance of the contract except that goals are not required with respect to trades covered by an OFCC approved multi-employer program.

8. *Post-Award Compliance*

a. Each agency shall review contractors' and subcontractors' employment practices during the performance of the contract. If the goals set forth in the affirmative action program are being met, the contractor or subcontractor will be presumed to be in compliance with the requirements of Executive Order 11246, as amended, unless it comes to the agency's attention that such contractor or subcontractor is not providing eqal employment opportunity. In the event of failure to meet the goals, the contractor shall be given an opportunity to demonstrate that he made every good faith effort to meet his commitment. In any proceeding in which such good faith performance is in issue, the contractor's entire compliance posture shall be reviewed and evaluated in the process of considering the imposition of sanctions. Where the agency finds that the contractor or subcontractor has failed to comply with the requirements of Executive Order 11246, the implementing regulations and its obligations under its affirmative action program, the agency shall take such action and impose such sanctions as may be appropriate under the Executive Order and the regulations. Such noncompliance by the contractor or subcontractor shall be taken into consideration by Federal agencies in determining whether such contractor or subcontractor can comply with the requirements of Executive Order 11246 and is therefore a "responsible prospec-

tive contractor" within the meaning of the Federal procurement regulations.

b. It is no excuse that the union with which the contractor has a collective bargaining agreement failed to refer minority employees. Discrimination in referral for employment, even if pursuant to provisions of a collective bargaining agreement, is prohibited by the National Labor Relations Act and Title VII of the Civil Rights Act of 1964. It is the longstanding uniform policy of OFCC that contractors and subcontractors have a responsibility to provide equal employment opportunity if they want to participate in Federally-involved contracts. To the extent they have delegated the responsibility for some of their employment practices to some other organization or agency which prevents them from meeting their obligations pursuant to Executive Order 11246, as amended, such contractors cannot be considered to be in compliance with Executive Order 11246, as amended, or the implementing rules, regulations and orders.

9. *Exemptions*

a. Requests for exemptions from this Order must be made in writing, with justification, to the Director, Office of Federal Contract Compliance, U. S. Department of Labor, Washington, D. C., 20210, and shall be forwarded through and with the endorsement of the agency head.

b. The procedures set forth in the Order shall not apply to any contract when the head of the contracting or administering agency determines that such contract is essential to the national security and that its award without following such procedures is necessary to the national security. Upon making such a determination, the agency head will notify, in writing, the Director of the Office of Federal Contract Compliance within thirty days.

c. Nothing in this Order shall be interpreted to diminish the present contract compliance review and complaint programs.

10. *Authority*

This Order is issued pursuant to Executive Order 11246 (30 F.R. 12319, Sept. 28, 1965) Parts II and III; Executive Order 11375 (32 F.R. 14303, Oct. 17, 1967); and 41 CFR Chapter 60.

11. *Effective Date*

The provisions of this Order will be effective with respect to transactions for which the invitations for bids or other solicitations for bids are sent on or after July 18, 1969.

APPENDIX

(For Inclusion in the Invitation or Other Solicitation for Bids for a Federally-Involved Construction Contract When the Estimated Total Cost of the Construction Project Exceeds $500,000.)

NOTICE OF REQUIREMENT FOR SUBMISSION OF AFFIRMATIVE ACTION PLAN TO ENSURE EQUAL EMPLOYMENT OPPORTUNITY

1. It has been determined that in the performance of this contract an acceptable affirmative action program for the trades specified below will result in minority manpower utilization within the ranges set forth next to each trade:

Identification
of Trade

Range of Minority
Group Employment

2. The bidder shall submit, in the form specified below, with his bid an affirmative action program setting forth his goals as to minority manpower utilization in the performance of the contract in the trades specified below, whether or not the work is subcontracted.

The bidder submits the following goals of minority manpower utilization to be achieved during the performance of the contract:

Identification of Trade

Estimated Total Employment
for the Trade on the Contract

Number of Minority
Group Employees

(The bidder shall insert his goal of minority manpower utilization next to the name of each trade listed.)

3. The bidder also submits that whenever he subcontracts a portion of the work in the trade on which his goals of minority manpower utilization are predicated, he will obtain from such subcontractor an appropriate goal that will enable the bidder to achieve his goal for that trade. Failure of the subcontractor to achieve his goal will be treated in the same manner as such failure by the prime contractor prescribed in Section 8 of the Order from the Office of Federal Contract Compliance to the Heads of All Agencies regarding the Revised Philadelphia Plan, dated June 27, 1969.

4. No bidder will be awarded a contract unless his affirmative action program contains goals falling within the range set forth in paragraph 1 above, provided, however, that participation by the bidder in multi-employer program approved by the Office of Federal Contract Compliance will be accepted as satisfying the requirements of this Notice in lieu of submission of goals with respect to the trades covered by such multi-employer program. In the event that such multi-employer program is applicable, the bidder need not set forth goals in paragraph 2 above for the trades covered by the program.

5. For the purpose of this Notice, the term minority means Negro, Oriental, American Indian and Spanish Surnamed American. Spanish Surnamed American includes all persons of Mexican, Puerto Rican, Cuban or Spanish origin or ancestry.

6. The purpose of the contractor's commitment to specific goals as to minority manpower utilization is to meet his affirmative action obligations under the equal opportunity clause of the contract. This commitment is

not intended and shall not be used to discriminate against any qualified applicant or employee.

7. Nothing contained in this Notice shall relieve the contractor from compliance with the provisions of Executive Order 11246 and the equal opportunity clause of the contract with respect to matters not covered in this Notice, such as equal opportunity in employment in trades not specified in this Notice.

8. The bidder agrees to keep such records and to file such reports relating to the provisions of this Order as shall be required by the contracting or administering agency.

[Exhibit P-185]

The
CONTRACTORS ASSOCIATION
of Eastern Pennsylvania
350 Suburban Station Building, Philadelphia, Pa. 19103
LOcust 3-4455

Officers
WILLIAM F. McGLYNN
President
DOMINIC J. LOMBARDI
1st Vice President
THOMAS B. SMITH, II
2nd Vice President
THOMAS P. DURKIN
Treasurer
H. G. MINCKLER
General Manager
A. A. ANTONUCCI
Executive Secretary

Directors
JOHN BUCKLEY
FRANCIS A. CANUSO, JR.
A. HARDEN COON
WILLIAM B. GELBACH
JAMES GLASGOW
HARRY R. HALLORAN
JOHN F. MEEHAN
HARRY W. MERZ
J. PAUL SKELLY
LOUIS VALLONE
ERNEST C. VENTRESCA

January 14, 1970

James S. Longacre, Executive Director
Pennsylvania State Council
International Union of Operating Engineers
829 State Road
Lemoyne, Pennsylvania 17043

Dear Jim:

This will confirm the results of our meeting with you on Monday, January 12, 1970.

The contractors in eastern Pennsylvania will participate financially in operating Ben Franklin II up to the amount of $40,000 either in cash and/or equipment.

This agreement to participate is predicated on the understandings reached at the various meetings with representatives of the Pennsylvania Department of Highways, Department of Community Affairs and the contractors concerning prequalification and credit for par-

ticipation being given only to those contractors in the 34 eastern Pennsylvania counties who are contributors to the program.

Very truly yours,

/s/ Howard G. Minckler
HOWARD G. MINCKLER
General Manager

[Exhibit P-186]

[SEAL]

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HIGHWAYS
Harrisburg, Pennsylvania 17120

January 15, 1970

Office of Secretary of Highways

Gentlemen:

Operation Ben Franklin II, a new program for training disadvantaged to become equipment operators, is recognized by the Department as a multi-employer training program. If you are affiliated with an AFL-CIO Operating Engineers Union, you can qualify under the prequalification for Equal Employment Opportunity (Part III). This can be done by participating in this program through respective contractors associations.

If you do not have your own training program, your prequalification will now be reviewed closely through the Western and Eastern Contractor Associations to determine if you are participating in Operation Ben Franklin II. This will determine if you meet the requirements of Part III of the prequalification.

Operation Ben Franklin II is a state-wide program administered by the Pennsylvania State Council of International Union of Operating Engineers. If you want to become affiliated with this program, please contact your respective association.

If you have any questions, please contact Mr. Julius L. McCoy, in our Equal Opportunity Division, at Area Code 717-787-5891.

Sincerely yours,

/s/ Robert G. Bartlett
ROBERT G. BARTLETT
Secretary of Highways

[Exhibit P-187]

The
CONTRACTORS ASSOCIATION
of Eastern Pennsylvania

[SEAL]

March 4, 1970

To: ALL HIGHWAY CONTRACTORS

You have all been notified by the Pennsylvania Department of Highways of the development of a new training program for Operating Engineers called Ben Franklin II.

The first training program, Ben Franklin I, was basically financed by the Federal and State governments—it was also supported through voluntary contributions by some Contractors who donated rent-free some of the large equipment used in the training. When the new program was being developed—it was impossible to secure complete government financing.

As you know, under the EEO regulations drawn pursuant to the Federal Highway Act of 1968, it is necessary that training programs for upgrading minorities be developed. Programs must be developed and continued to show the Contractors' good faith efforts. Therefore, in order to continue to make Contractors eligible for bidding under the Pennsylvania pre-qualifications rules, it was necessary for the Industry to guarantee partial funding of the training program. The Industry guaranteed $80,000 statewide, $40,000 for the 34 eastern counties, to aid in financing the training program.

The State has made us responsible for raising this money—it has also made us responsible for determining which Contractors are participating in the training program. Participation will be determined by the Contractors Association.

In order to make the training program available to all Contractors, we have set up a new corporation called Construction Training, Inc. We will also use it in the development of other programs in the future. To fund this and other required future programs, it has been determined that each Contractor shall make a minimum contribution of $200 to Construction Training, Inc. Thereafter, Contractors shall make contributions to Construction Training, Inc. at the rate of $0.04 per hour for each hour for which payment of wages or guaranteed compensation has been made to an operating engineer, oiler or apprentice beginning March 1, 1970 through October 31, 1970. Payment of contributions shall be made monthly with the first payment due on April 1, 1970 covering contributions for the month of March, 1970; the initial minimum contribution of $200 will be credited against contributions due.

Further information will be sent in the near future from Construction Training, Inc. regarding contributions and your participation in the training program.

[Exhibit P-252]

CONSTRUCTION TRAINING, INC

350 Suburban Station Building
Philadelphia, Pennsylvania 19103
215-563-4455

5 March 1970

TO: ALL CONTRACTORS

Reference is made to letter dated January 15, 1970 sent to all contractors by Robert G. Bartlett, Secretary of Highways, regarding prequalification for Equal Employment Opportunity, Part III (copy attached). Reference is also made to explanatory letter dated March 4, 1970 sent you by the Contractors Association of Eastern Pennsylvania.

This corporation has been set up to make Operation Ben Franklin II available to all contractors and also to develop training programs required by the various EEO regulations. In order to fund the present program and future ones, contractors will be required to make a minimum contribution of Two Hundred Dollars ($200) to Construction Training, Inc. payable upon this notification. Thereafter, contractors shall make contributions to CTI at the rate of Four Cents ($.04) per hour for each hour for which payment of wages or guaranteed compensation has been made to an operating engineer, oiler or apprentice for the period beginning March 1, 1970 through October 31, 1970. The initial minimum contribution of $200 will be credited against contributions due and payable. A copy of your monthly report to the Operating Engineers Welfare/Pension Fund will be acceptable to determine total hours on which the contribution of 4¢/hour will be applied.

Payment of contributions shall be made monthly, the first payment being due on April 1, 1970 covering contributions for the month of March, 1970. Only by prompt, current payments will we be able to verify to the Pennsylvania Department of Highways that you are a participating contractor in this program.

Inquiries for additional information may be directed to Howard G. Mickler or Andy A. Antonucci.

[Exhibit P-206]

U.S. DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT COMPLIANCE
Western Saving Fund Building, Room 1142
Philadelphia, Pennsylvania 19107

[SEAL]

December 15, 1970

Howard G. Minckler, General Manager
The Contractors Association of
Eastern Pennsylvania
350 Suburban Station Building
Philadelphia, Pa. 19103

Dear Howard:

In response to your letter dated December 3, 1970, I am enclosing a copy of our most recent list of resources which Federal contractors can utilize to recruit minority workers.

Fruitful results will depend upon the meaningfulness of a contractor's effort. Mere form letters or routine telephone calls will not produce effective results.

Results are most likely if a contractor attempts to establish rapport with the community organizations over a period of time. Also, it is urged that a contractor stress realistic qualifications and requirements. A contractor's present journeymen, helpers or apprentices represent skills ranging from excellent to fair to poor. The same range of skills will be found among minority journeymen, helpers, or apprentices. No more should be required of minority workers than a contractor requires of the workers otherwise obtained.

The majority of the contractor's present workers learned their skills by doing them on the job. What is

sought under equal employment opportunity is that minority workers be given the same opportunity.

When utilizing these sources, a contractor is urged to go to them with a special job order in hand. Any request to these referral sources should clearly state which company is hiring, where the job is located, when the job will start, and what the rate of pay will be.

We keep in close touch with the referral organizations concerning contractors' efforts to recruit through them. We will be happy to hear further from you as to your results.

Very truly yours,

/s/ Ben
BENNETT C. STALVEY, JR.
Mid-Atlantic Area Coordinator

[Enclosures Omitted in Printing]

[Exhibit P-190]

July 23, 1971

James S. Longacre, Executive Director
Pennsylvania State Council of
International Union of Operating Engineers
829 State Road
Lemoyne, Pennsylvania 17043

Re: Ben Franklin II

Dear Jim:

Thanks for the report you sent to us on Ben Franklin II, it was appreciated.

As you know, Construction Training, Inc. was established to help fund any training programs for union contractors we might get involved in. Our auditors have checked over the books of CTI and feel that we should have something in the record to show that the checks sent to you on January 27, 1970 for $5,000.00 (a CAEP check) and a CTI check for $20,000.00 issued June 24, 1970 were used in the Ben Franklin II program. A letter of acknowledgement from you to CTI would suffice.

Best regards.

Very truly yours,

/s/ Howard G. Minckler
HOWARD G. MINCKLER

[Exhibit P-194]

OPERATION BEN FRANKLIN

SPONSOR:

International Union of Operating Engineers
Pennsylvania State Council

CONCEIVED AND PROPOSED BY:

James S. Longacre, Executive Director
Pennsylvania State Council, I.U.O.E.

ASSISTANTS:

Robert Walsh, Business Manager
Local 542—I.U.O.E.

Ray Drew, Business Manager
Local 66—I.U.O.E.

FOR THE CONSTRUCTION INDUSTRY:

Howard Minckler, Executive Secretary
Eastern Pennsylvania Contractors Association

FOR THE STATE OF PENNSYLVANIA

*Hon. Robert G. Bartlett, Secretary of Highways

*Hon. Joseph W. Barr, Jr., Secretary of Community Affairs

*These two men were instrumental in funding the program.

PROJECT DIRECTOR:

Carl J. Nygard, Local 542, I.U.O.E.

ASSISTANT PROJECT DIRECTOR

Harvey Underwood, Local 66, I.U.O.E.

BASIC CONCEPT:

Development of the need for a workable attack relating to the Affirmative Action phase of Equal Opportunity employment problems confronting the operating engineers and the construction companies.

Operation for ——— is a six-month training course on heavy equipment in the construction industry ——— for men among the hard-core minorities.

Trainees were selected on a state-wide basis through the cooperation of the Bureau of Employment Security. There are representative trainees from ALL areas of the state.

Greatest representation comes from Pittsburgh and Philadelphia areas. Scranton, Erie, Reading and Harrisburg are also represented.

Field training includes instruction in operating dozers, fans, backhoes, bore drillers . . . to name a few.

Classroom instruction utilizes the most modern textbooks, manuals, visual aids and manufacturers' texts. Trainees are given opportunity to secure a General Education Development Diploma through assorted subjects including remedial reading. This is invaluable to those trainees who have not completed their high school education.

HOUSING:

Trainees and instructors are lodged in comfortable facilities provided by Vacation Valley and Echo Valley Lodge, two of the finest resort locations in the Pocono Mountains.

MEALS:

Three meals, well planned, are provided each day through a training program conducted by the Dutch

Pantry restaurant for all trainees and other personnel. Lunch is served at the work site.

WORK OPERATION:

All work is conducted at Resica Falls Boy Scout Reservation. Here, as part of the work performance, the trainees are constructing side roads and picnic areas plus a 20-acre lake for use by the Boy Scouts.

WORK PROJECTS:

Wild Goose Project

Rework of present roads (2.8 miles)
New roads (1.7 miles)
New camp layout
Land fill (600 yards)
Pond (beautification)
Little Bear Lake (to provide swimming, boating, fishing . . . 30 acres)

River Road Project

Rework of present roads (3.1 miles)
Parking lots
Pond (beautification)
Firebreak (2.7 miles)
Facilities (archery range—rifle range)
Suspension bridge (20 ft.—a safety measure)

Firestone Road Project

Rework of present roads (2.5 miles)
Parking lot
Pole line (to provide electric power to camp area)
Water tower (20,000 gallons)

Camporee Area

Rework of present roads (¼ mile)
Pond (beautification)
Removal of fill (6000 yards)

Total value of these improvements is estimated at $1.5 million.

Number of Graduates—86.

Term of instruction—December 1968 through June 6, 1969.

Graduates will be placed in jobs on highway construction.

ADMINISTRATION PERSONNEL:

J. E. Jefferson, Office Manager
Mrs. Susan Buckingham, Secretary
Mrs. Elaine Leader, Clerk

EMPLOYER CONTRIBUTIONS RECEIVED AND HOURS REPORTED 1-2-76
(CENTS OMITTED)

YEAR	HOURS	CHECK-OFF	APPRENTICESHIP	WELFARE	PENSION	TOTAL
1960	5,473,232					
1961	5,039,497					
1962	6,203,290					
1963	5,756,107					
1964	6,[illegible],[illegible]					
1965	7,517,801					
1966	11,951,186	$110,846	$84,433	$1,233,229	$1,475,829	$2,[illegible],[illegible]
1967	8,745,776	192,654	82,096	1,312,243	1,993,595	$3,[illegible],[illegible]
1968	10,353,677	268,916	93,420	1,455,674	2,472,434	$4,021,[illegible]
1969	10,114,764	271,438	95,892	1,570,170	3,301,935	$5,[illegible],[illegible]
1970	10,264,470	280,601	125,902	2,048,711	3,561,749	$5,[illegible],[illegible]
1971 (to mid strike)	8,798,138	424,766	409,146	1,805,035	3,024,125	$5,[illegible],[illegible]
1972	9,796,769	761,324	538,426	3,650,383	4,901,424	$9,851,557
1973	9,348,484	1,261,536	800,077	3,743,889	6,830,860	$11,[illegible],[illegible]
1974	9,369,251	1,605,233	982,327	3,967,879	8,120,524	$14,[illegible].958.
1975 (5 mo strike)	8,011,692	1,481,020	903,504	3,647,200	7,507,388	$13,539,112
1976 (projected 11-19-76)	7,930,000					

[Exhibit U-365(a)]

[Exhibit U-359]

CLERK-OFF HOURS APPROX. FOR STORES, STATIONS ETC. &
APPROXIMATE GROSS ANNUAL WAGES TO OPERATING EMPLOYEES.
(TOTAL GROSS WAGES APPROX $74,930,634)

U-359

		Number	Clerk-Off Hours	% of Op Hours	
1	B	22	26,301	2.2	Bears County
	C	72	314,783	27.1	Centennial Area
	D	31	34,219	2.9	Del. Centennial Area
	G	54	58,772	4.9	G.R.C.A.
	I	19	21,099	1.7	Int. Allegheny
	S	15	6,200	0.5	Susquehanna Railroad
	W	4	37,728	2.6	Railway & Dock Builders
	E	5	28,431	2.3	Equipment Rental Corp.
	K	24	10,107	0.8	Keystone
	L	15	15,709	1.2	Lattice Valley
	V	20	8,398	0.7	Wyoming Valley
		281	555,029	48.0	
2		216	378,413	32.8	Independent Contractors
		(Total Employees)			
0		497	1,337,394	33.0	Hrs Reported - No Stores Clerks
		951	1,241,526	100.0	
		11.5	Less Than 1/2	1/2	Coke Area 782 .1%
		241	" "	1/2	" 48,015 4.1%
		411	" "	1/2	" 267,100 21.7%
		129	Over 1/2		975,269 (77.9%
			(17 Locate of the Above		437,789 35.7%
			(4 " "		264,312 21.1%)

Bears	26,301
Cent	314,783
Del Cent	34,219
GRCA	58,772
Int	21,099
Sus	6,200
Rwy	37,728
Equip	28,431
Key	10,107
Lat	15,709
Wyo	8,398
Indep	378,413
Stores	1,337,394
Coke	782
	48,015
	267,100
	975,269
	1,241,526

[Trial Exhibit P-214]

[SEAL]

BY-LAWS

of

Local Unions 542, 542a, 542b, 542c, 542d
Adopted by the membership on

and

LOCAL UNION DEATH BENEFIT RESOLUTION AND AMENDMENTS

[UNION LABEL]

Jurisdiction of Local 542
Eastern Pennsylvania
and the State of Delaware

By-laws of Local Unions 542, 542A, 542B, 542C, 542D

OBJECT AND PURPOSE

For its object and purpose, Local Union No. 542, 542A, 542B, 542C and 542D hereby adopts the following language of the Constitution of the International Union of Operating Engineers, making only such changes as are necessary to make such language applicable to a Local Union.

The objects and purposes of this organization are to elevate the trade of operating engineers (by which trade the memberships thereof earn a livelihood for themselves and their dependents) to its proper position in all industrial activity and the ranks of organized workers; to encourage a higher standard of skill among its members; to cultivate feeling of friendship among the men of the craft and those who may employ its members; to assist its members in securing and stabilizing employment; to assist employers in obtaining skilled craftsmen from among its membership; to encourage and assist affiliated Local Unions to negotiate and consummate contractual relations with employers, through which wages, hours and conditions of employment may be properly regulated to the benefit of both the membership and the employer; to encourage and legislate for, or by economic means secure, such reduction of the number of daily and weekly hours of labor as will guarantee the proper distribution of available work to the greatest number of the craft; to bring about increased opportunity for recreation and rest; the proper freedom to observe the days set aside for religious worship and those recognized as the days to commemorate certain National, State and City events and Labor Day; to elevate the moral, intellectual and social conditions of all members by legal and proper means, and to encourage, aid and assist all local unions

in the enactment of State Engineers License Laws for the better protection of life and property through its various subdivisions and officers.

Local Union No. 542, 542A, 542B, 542C and 542D shall be dedicated to law and order and pledged to support and maintain the established system of government in the United States and the states within the jurisdiction of Local Union No. 542 under which this organization has grown and prospered; to countenance no change in such system of government save through the orderly processes provided by law; to vigorously oppose the efforts of those who engage in, advocate, support or approve the overthrow of the established order (whether of the government or of this organization) by force of arms, subversive tactics, bloodshed and violence or the other revolutionary means by which Communists and their ilk seek to gain their ends.

ARTICLE I

Jurisdiction

Section A. The jurisdiction of Local Union No. 542, 542A, 542B, 542C and 542D shall be that granted by the International Union of Operating Engineers as inscribed on the Charter issued and/or amended by the International Union of Operating Engineers in accordance with the provisions of the International Constitution.

Section B. District Administration Form of Local Union Government shall be set up as defined in Article XXV, Section I of the International Constitution.

Section C. The territorial jurisdiction shall be divided into districts described as follows:

District No. 1. Philadelphia, Chester, Montgomery, Bucks and Delaware Counties.

District No. 2. Lehigh, Northampton, Berks and Lancaster Counties.

District No. 3. Lackawanna, Pike, Carbon, Bradford, Sullivan, Wayne, Columbia, Monroe, Susquehanna, Wyoming and Luzerne Counties.

District No. 4. Tioga, Lycoming, Montour, Juaniata, Cumberland, Adams, Snyder, Perry, Lebanon, Union, Dauphin, Schuylkill, Northumberland and York Counties.

District No. 5. State of Delaware.

Section D. The territorial districts as described in Section C above may be changed from time to time by the Business Manager of the Local Union to conform with changing local conditions. However, voting rights of the members residing in the various counties set forth in Section C above, shall not change.

ARTICLE II

Meetings

Section A. Regular Meetings of General Membership.

The regular meetings of the general membership of this Local Union shall be held semi-annually in Philadelphia, Pennsylvania, on the first Saturday in June of each year commencing at 1:00 p.m. and on the first Saturday in December of each year commencing at 1:00 p. m., and at such other times and places as may be designated by the Executive Board. Adequate notice of all regular meetings of the general membership shall be given to the membership not less than two weeks before the time of such meeting.

Section B. Regular Meetings of Executive Board.

The regular meetings of the Executive Board shall be held as often as necessary and not less than once every month. The time and place of such meeting shall be determined by the President, and adequate notice thereof shall be given not less than two weeks before the time for such meeting.

Section C. Regular Meetings of District Membership.

The Regular District Membership meetings shall be dispensed with in all Districts during the months of June and December of each year.

Regular meetings of the members residing within any District into which the territorial jurisdiction of the Local Union is divided shall be held at least once every month, except as set forth hereinabove, at the following time and place:

District No. 1. First Friday of each month in Philadelphia at time and place to be designated at the preceding District membership meeting.

District No. 2. Third Tuesday of each month in Reading at time and place to be designated at the preceding District membership meeting.

District No. 3. Third Thursday of each month in Wilkes-Barre at time and place to be designated at the preceding District membership meeting.

District No. 4. First Thursday of each month in Harrisburg at time and place to be designated at the preceding District membership meeting.

District No. 5. Second Wednesday of each month in Wilmington, Delaware, at time and place to be designated at the preceding District membership meeting.

Section D. Called Special Meetings of General Membership.

In addition to the other methods prescribed in the Constitution of the International Union of Operating Engineers, the President of Local Union No. 542 or the Executive Board, shall have the power to call special meetings of the general membership at such time and place as they deem appropriate. The call of such special meet-

ing shall contain adequate notice of the time and place thereof, and the nature of the business to be undertaken. The business of such meeting shall be confined to that stated in the notice.

Section E. Called Special Meetings of the Executive Board.

The President of Local Union No. 542 shall have the power to call special meetings of the Executive Board at such time and place as he deems appropriate. Notice of such special meeting may be made by any means reasonably calculated to inform the members of the Executive Board of the time and place of such meeting. The Executive Board, at a special meeting, may transact such business as may come before it at that time.

Section F. Called Special Meetings of District Membership.

The President of the Local Union shall have the power to call meetings of the district membership at any time and at any place within the District. The call of such special meeting shall contain adequate notice of the time and place thereof and the nature of the business to be undertaken. The business of such meeting shall be confined to that stated in the notice.

Section G. Roberts' Rules of Order shall be the guide for proceedings before all meetings of the Local Union.

ARTICLE III

Meetings, Presiding Officers

Section A. The President shall preside at all regular meetings of the general membership and at all regular meetings of the Executive Board. In the absence of the President, the Vice President shall preside at all such

meetings. In the absence of both the President and the Vice President, Roberts' Rules of Order will be followed in the selection of presiding officer, consistent with Article XXIII, Subdivision 2, Section (c) of the International Union of Operating Engineers Constitution.

Section B. The District Business Representative shall preside at all regular meetings of the District membership. Where there is more than one District Business Representative in any given District, the President of the Local Union shall designate which District Business Representative will preside at the regular meetings of the District membership. The presiding officer of any District membership meeting may appoint the Secretary, Guard and Conductor to perform the Ritual of the District membership.

ARTICLE IV

Authority of District Membership Meetings

The authority of the District membership meeting shall be confined to such powers as shall be expressly conferred by these By-laws pursuant to Article XXV of the International Constitution and shall be limited to:

1. Making recommendations to the Local Union or the Executive Board;
2. Initiating legislation and referendums to the Local Union;
3. Electing members to the Executive Board of the Local Union according to the provisions of the International Constitution and these by-laws;
4. Discussing work promotion projects, industry planning and matters of general interest for good and welfare of the Local Union;

5. Holding trials of members within the District;

6. The District membership meeting shall be without power to consider or act upon any matter not outlined in this Article.

ARTICLE V

Minutes of District Membership Meetings

It shall be the duty of the District Business Representative to see that minutes are kept of all District membership meetings, and that a copy thereof, attested by the District Business Representative, is filed with Local Union No. 542 for approval. For this purpose, the District Business Representative shall be entitled to appoint a member of the District to act as Secretary.

ARTICLE VI

Rules of Order

Section A. At the hour appointed, the presiding officer shall call the meeting to order.

The authority of the presiding officer in the conduct of the meeting shall be as set forth in Roberts' Rules of Order.

Section B. No member shall be allowed to leave the meeting while in session except by permission from the presiding officer.

Section C. Any member refusing to obey the Constitution, By-Laws, Rules, Regulations and Orders of this Union may be fined, suspended, or expelled as the Union may determine.

Section D. No member under the influence of intoxicating liquor shall be admitted to the meeting.

Section E. The presiding officer shall have the power to exclude from the meeting any member guilty of indecorous or unruly conduct.

Section F. The presiding officer shall preserve order and pronounce the decision of the meeting on all subjects. He shall decide all questions of order without debate, subject, however, to an appeal to the meeting by any member.

Section G. Appeals from the decision of the Chair shall not be debatable except by the presiding officer and the member making the appeal.

Section H. Appeals shall be stated by the Chair in this form:

"Shall the decision of the Chair be overruled?"

A two-thirds affirmative vote shall be necessary to overrule the Chair.

Section I. A motion will not be subject to debate until it has been recorded and stated by the Commission.

ARTICLE VII

Elective Officers

The elective officers of this Local Union shall be the Business Manager, President, Vice President, Recording Corresponding Secretary, Financial Secretary, Treasurer, Three Trustees, Three Auditors, Conductor and Guard. The President and Business Manager by virtue of their Elective position be Delegates Representing Local Union 542 to the General Convention and all other Conventions, Conference Councils within AFL-CIO and to State Interstate or Provincial Organizations. The offices of the Financial Secretary and Treasurer shall not be held by the same person at one time. All elective officers of Local Union No. 542 shall be officers ex-officio of all committees, boards of District membership meetings occurring within Local Union No. 542 or the various Districts into which such Local Union may be divided.

ARTICLE VIII

Business Manager

Section A. There shall be a Business Manager for the entire territorial jurisdiction of the Local Union and sufficient assistants to be known as District Business Representatives for each of the several territorial Districts into which the Local Union shall be divided.

Section B. The Business Manager shall be the Executive Manager of Local Union No. 542 and its branches, and, as such, will be in full charge of its affairs, and shall be responsible to the Executive Board of the Local Union for his stewardship. The Business Manager shall appoint, supervise, oversee, and have control of all assistants to him, known as District Business Representatives. The Business Manager shall determine the wages and allowances of his assistants and/or Business Representatives. The Business Manager shall be authorized and empowered, on behalf of Local Union No. 542, to employ such clerks, stenographers, secretaries and other assistants as, in his opinion, the needs of the Local Union may require.

Section C. The District Business Representative shall assist the Business Manager and perform such duties as shall be required under his direction.

Section D. The Business Manager shall be elected in the same manner as the elective officers of the Local Union.

ARTICLE IX

Term of Office

The term of office of all elective officers and the term of office of the Business Manager shall be for a period of three years. In the event a person shall take office for any reason whatsoever after the beginning of the term of that office, he shall hold that office only for the period of the unexpired term.

ARTICLE X

Election of Officers

Section A. The nomination of officers shall be held at a Special General Membership Meeting called specifically for that purpose by the President, and held during the month of July with the election held in the month of August. The newly-elected officers shall be installed, take office and begin their terms in the month of September. The Local Union's Executive Board prior to the Regular Meeting of the General Membership in June shall determine the method of voting for the Local Union officers in an election year, which shall be either by mail referendum conducted by secret ballot among the membership or by the Australian ballot system in which event the provisions of Article XXV, Section I, Subsection (h) of the International Union of Operating Engineers Constitution shall be followed.

Section B. No member shall be eligible for election, be elected or hold office unless he is actively engaged in the craft and shall have been a member in continuous good standing in the Local Union for not less than the preceding twelve months. Provided, however, no member shall be eligible for election as Business Manager unless he shall have been in continuous good standing for a period of three years prior to his nomination.

Section C. If any vacancy occurs in any office, it shall be filled in accordance with the provisions of Article XXIII, Subdivision 1, Section (f) of the International Constitution.

ARTICLE XI

Executive Board

Section A. The Executive Board shall be composed of the following officers:

President, Vice President, Recording Secretary, Financial Secretary, Treasurer, Business Manager, and nine

members of Local Union 542, who shall be elected from the several Districts as follows:

5 from District 1
1 from District 2
1 from District 3
1 from District 4
1 from District 5

Section B. No member shall be eligible for election, be elected, or sit on the Executive Board unless he is actively engaged in the craft and shall be a member in continuous good standing for the preceding twelve months.

Section C. Each District shall nominate and elect its representatives on the Executive Board from among the members in the District. Nominations will be held at the Special General Membership Meeting in July, with elections to follow during the month of August. Members must reside in area one year before running for office in that District.

Section D. The term of office of each of the nine members of the Executive Board elected from the several Districts shall be co-extensive with that of the other members of the Local Executive Board.

Section E. In the interim between regular meetings of the General Membership of the Local Union, the Executive Board shall be the policy-making and administration tribunal of the Local Union, all of which acts of the Local Executive Board to remain in full force and effect subject only to revocatian by action of the General Membership of the Local Union, if taken at the next subsequent general Membership Meeting following the adoption of the act in question, or subject to being revoked by referendum initiated by any District and submitted to the General Membership of the Local Union within 30 days subsequent to the adoption of the act complained of should no General Membership Meeting occur during such period.

ARTICLE XII

Initiation Fees

Section A.

The initiation fees of the Local Union shall be as follows:

Local Union No. 542—$200.00
plus tax required by the International Union.

Local Union No. 542A—$25.00
plus tax required by the International Union.

Local Union No. 542B—$50.00
plus tax required by the International Union.

Local Union No. 542C—$5.00 & $20.00
plus tax required by the International Union.

In addition to the foregoing Initiation Fees, there shall be a death benefit fund initiation fee of $20.00.

Any qualified "A" or "B" member may make application for membership in the Parent Body. Provided, however, that no member of the "A" Branch shall make such application unless or until he has worked at the craft as a member of the "A" Branch for a period of four years, unless otherwise qualified under the Local Union's Apprentice Training Program; and provided further that no member of the "B" Branch shall make such application unless and until he has worked at the craft as a member of the "B" Branch for a period of three years. Where a Branch member, making application for membership in the Parent Body, is notified of its acceptance, he shall within sixty days pay the additional initiation fee and be sworn in as a member of the Parent Body. Failure to pay the additional initiation fee within 60 days constitutes an automatic withdrawal of the acceptance and requires a new application of the Branch member.

Section B. A journeyman in the Operating Engineers Local 542 is an operator who carries a 542 Parent Body Book. This book signifies that he has qualified as an Operating Engineer on various types of production equipment within the jurisdiction of the Operating Engineers, or a qualified heavy duty mechanic or welder. The Parent Body Book also entitles him to perform the work of his skill on any type of construction work within the scope of the Operating Engineers, except oiling, and that only with the consent of the Business Representative.

A Branch Engineer is an Operating Engineer who is not solely qualified as a Parent Body Engineer, but who after three years as a Branch "B" Engineer may make proper application for transfer to the Parent Local. This application to go before the Examining Board of the Local Union or any future Boards to be set up by the Local Union to handle transfers of this type.

ARTICLE XIII

Dues

There shall be charged to, and collected from, all members of the Parent Local Union No. 542 the sum of $9.00 per month, and from all members of Local Union No. 542A the sum of $7.50 per month, and from all members of Local Union 542B the sum of $9.00 per month, and from all members of Local 542C the sum of $6.50 and $7.00 per month. This sum is to be paid monthly on or before the first business day of each month.

Members thirty (30) days in arrears in the payment of current dues or assessments to the Local Union shall be denied voice and vote therein.

Members sixty (60) days in arrears in the payment of dues or assessments shall be barred from meetings or removed from committees or both, or suspended from membership.

Members ninety (90) days in arrears in the payment of dues or assessments shall be removed from office.

ARTICLE XIV

Fines and Assessments

All fines and assessments levied or imposed shall be handled in accordance with Article XXIII, Subdivision 7, Sections (e), (f), (g) of the International Constitution.

ARTICLE XV

Bond of Officers and Employees

Every officer, representative or employee handling funds or other property of the Local Union shall be adequately bonded to insure the faithful discharge of his duties. The amount of the bond shall be fixed by the Local Executive Board in accordance with existing law.

ARTICLE XVI

Employment Practices

The Executive Board of Local Union No. 542 shall have the power to prescribe the rules and regulations governing hiring hall practices consistent with public policy and the requirements of the law.

ARTICLE XVII

Quarterly Audits of Financial Records

The financial records of Local Union No. 542, 542A, 542B, 542C and 542D shall be audited quarterly by a Certified Public Accountant, and such audit reports shall be read to the membership at the next General Membership Meeting following the receipt of such audits.

ARTICLE XVIII

Amendments to By-Laws

All proposed amendments to the By-laws of Local Union No. 542 shall be submitted in writing to the Recording Corresponding Secretary at any time up to and including August 31 of the current year which shall be the cut-off date for the then current year. All proposed amendments thus admitted will be considered by the Local Union's Executive Board at its regularly scheduled meeting in September or at a Special called meeting of the Board for that purpose during the month of September and voted on by the membership during the month of December. Notice to the membership of proposed amendments shall be given at least 30 days before the same shall be acted upon. A copy of the proposed amendments shall be posted in a conspicuous place in every District Office. The Local Union may adopt and amend By-laws and Trade Rules by a majority vote of all members present at a General Membership Meeting or by mail referendum directed to the General Membership. The recommendation of the Executive Board may accompany all ballots concerning the adoption and amendment of By-laws. A copy of all proposed amendments to the By-laws shall accompany all ballots.

ARTICLE XIX

Matters Not Covered by By-laws

Section A. All matters not covered by the By-laws shall be covered by the Constitution of the International Union of Operating Engineers.

Section B. In the event any of the By-laws shall conflict directly or by implication with any of the provisions of the Constitution of the International Union of Operating Engineers, to that extent by the By-laws shall be null and void.

APPENDIX

Working Rules

Section A. Members becoming unemployed shall immediately contact their District Office and request that their names be placed upon the out-of-work roster. No one shall accept employment or recall unless referred by the Union.

Section B. No member shall take over the position of a member discharged without just cause. Intoxication, negligence and incompetency constitute "just cause." A member has the right to retain his position pending investigation of his dismissal.

Section B. (1) The following offenses shall constitute an offense discreditable to Local 542 I.U.O.E.

Being intoxicated or disorderly on the premises of the Local Union.

Being intoxicated while at work.

Section C. If a member is discharged for adherence to these working rules or to the Agreement in effect between the Local Union and the contractor, no member will be allowed to take his place.

Section D. Each member should be paid in full when he completes his work on a job. No member of the Union may quit a job until he has been properly relieved.

Section E. Any member leaving his work without notifying the employer and the business representative, so that arrangements can be made for his replacement, may be disciplined by the Union.

Section F. No member shall have claim rights to a job until he actually starts to work.

Section G. The Local Union holds each member responsible for his own position. No member should accept

a position held by a member who has not been properly laid off.

Section H. No member may enter into a private contract covering hours, wages, or working conditions within the jurisdiction of this Local Union.

Section I. No member shall teach a person who is not a member of this organization to operate a machine which comes under the jurisdiction of this Local Union.

Section J. Crews are responsible for the proper care and upkeep of the machinery on which they are working. Apprentices and oilers are under the supervision of the engineers at all times.

Section K. Any operator working without an apprentice or oiler on a piece of equipment which requires one shall be held responsible to the authority of the Local Union.

Section L. Any member of this Local Union who becomes an employer or foreman or superintendent must take a withdrawal card from the Union, after which time he will not engage in the operation of any equipment.

Section M. The employment of Master Mechanics, where necessary, is encouraged. Each member should make every effort to qualify himself for this very responsible position and upon being qualified, notify the District Office.

Section N. It is the duty of all members and applicant members to carry either books or current receipts at all times.

Section O. If a member is in doubt about the application of these Working Rules he should call the Local Union Office. Ignorance of these Working Rules will not be held valid as an excuse. The violation of any part may be punishable by fine, expulsion, or both, as the authority of the Local Union may direct.

Section P. Before starting to work on a new job, all members shall report to the Steward.

Section Q. When requested to do so by a Business Agent or Job Steward, all members shall show their dues book.

Section R. Members who fail to make claims for shortages in wages and/or overtime within fifteen days after the pay period shall be deemed to have waived the claim and shall be subject to disciplinary action for failing to report such shortage.

Section S. A member will be responsible for any breach of conditions of the Agreement and of the By-laws on the job on which he is working, and it will be his duty to report any such breach to Local 542 Office.

Section T. No member will be permitted to work within the mechanical jurisdiction of the Operating Engineers for an employer who is not in contracutal relations with the Local Union, without the knowledge and consent of the Business Representative in the District.

Section U. Members must show their pay checks or pay vouchers on request of the job Steward or Authorized Agent of the Local.

Local 542, 542A, 542B, 542C,
International Union of Operating Engineers
Death Benefit Fund

RESOLUTION

WHEREAS, the Union by resolutions duly adopted at various meetings of the membership thereof duly called and convened, established on or about January 1, 1948, a Death Benefit Fund (composed of contributions by the members of the sum of Twenty Dollars ($20.00) upon joining the Union and Fifty Cents ($0.50) per month thereafter) for the benefit respectively of the members of Local Union 542 and its Branches, Local Unions 542A and 542B and such of the members of Local 542C who have voluntarily made the required contributions to the Fund; which Death Benefit Fund thereafter functioned pursuant to such resolutions; and

WHEREAS, under date of June 2, 1958, by a Declaration of Trust, the "Local 542, International Union of Operating Engineers Death Benefit Fund" was created to succeed in full to the Death Benefit Fund, and said Fund has since then so functioned; and

WHEREAS, it has been deemed that for the betterment of the conditions of the members of said Local Unions, the "Local 542, International Union of Operating Engineers Death Benefit Fund" should be terminated, and that the Trustees thereof should transfer all funds and obligations thereof to said Local Unions, to be administered by them in a special fund as part of the Local Unions' activities;

NOW, THEREFORE, it is resolved that:

1. The Death Benefit Fund:

The Local Unions shall, together, establish and maintain a separate fund to be known as "Death Benefit Fund" (hereinafter referred to as the "Fund.")

2. Contributions to the Fund:

(a) Forthwith, the Trustees of "Local 542, International Union of Operating Engineers Death Benefit Trust Fund" shall transfer to the Fund all assets and balances, including cash and securities, held by them, of whatever nature. Said Trustees shall also turn over to said Local Unions all books and records of said Trust Fund, including record of all obligations of and claims made against said Trust Fund. Said assets and balances shall be paid into said Fund subject to any and all claims and obligations which may heretofore have been or may be hereafter properly made against the present Death Benefit Trust Fund, and shall be applied to all proper claims and obligations of said Trust Fund and the presently established Fund. After such transfers, the said Trust Fund and the Declaration of Trust under which it was created shall terminate.

(b) Amended Form. Each member of said Local Unions, 542, 542A and 542B, and those members of Local 542C, who voluntary choose to do so, shall contribute to the Fund the sum of Twenty Dollars ($20.00) upon joining the Union and the sum of Fifty Cents ($0.50) per month thereafter. Said monthly contributions shall be due and payable on the dates that Union dues are regularly payable, provided, however; that where a member, at his death was delinquent in the payment of dues or contribution for no more than 30 days there shall be a grace period expiring 30 days after his death for payment of such due and unpaid dues and contribution, upon payment of which, said deceased member shall, for the purposes of this Fund, be deemed to be a member in good standing.

(Amendment adopted at General Membership Meeting of December 4, 1964.)

3. Amount of the Death Benefit:

Upon the death of a member in good standing of Local Unions 542, 542A, 542B, or of a member of Local 542C

who has voluntarily made the required contributions to the Fund, there shall be paid to the beneficiary designated in writing by such member for the purpose, the sum of Six Hundred Fifty Dollars ($650.00).

4. Beneficiaries in Absence of Designation: Amended Form.

If a beneficiary has not been named in writing by the deceased member, or does not survive such deceased member, (or does not duly file and process claim for benefits as provided here under) payment will be made to the first surviving class of the following classes of successive preference beneficiaries:

(a) The member's widow

(b) His surviving children in equal shares

(c) His surviving parent or parents in equal shares

(d) His surviving brothers or sisters in equal shares

(e) Any person or persons appearing to the administrating officers to be equitably entitled to the payment of death benefits

(f) The Fund

(Amendment adopted at General Membership Meeting of December 4, 1964.)

5. Changes in Beneficiary Designation:

Changes in the designation of a beneficiary shall be effective only when recorded in writing by the member, and filed with the office of the Local Unions. The consent of a member's beneficiary shall not be requisite to any change of beneficiary.

6. Proof of Death and Claim: Amended Form.

Payment of Death Benefits shall be made to the named beneficiary or the proper substitute beneficiary described under Item 4 hereof, upon filing with the Fund of a claim

for benefits, accompanied by a certificate of Death of the deceased member within 90 days after the date of death, provided, however; that in the absence of any such claim the benefits shall revert to the Fund absolutely.

(Amendment adopted at General Membership Meeting of December 4, 1964.)

7. Administration of the Fund:

The Fund shall be administered as part of the Local Unions' activities. The assets of said Fund shall be maintained in separate and special bank accounts and specially identified as part of said Fund. All withdrawals of or dealing in the money and assets of said Fund shall be upon signatures of the Business Manager, President and Treasurer of said Local Unions.

8. Adoption of Rules and Regulations:

The administering officers of said Local Unions may, from time to time, adopt rules and regulations for administration of the Fund, within the framework of this Resolution. Said Rules and Regulations shall be subject to approval of the members of the Local Unions at the next regular meeting or at a special meeting.

9. Title to Money and Assets in the Fund:

(Title to all the money and assets paid into and received by the Fund shall be vested and remain in the Local Unions, and none of the members or their beneficiaries hereunder shall have any individual right, title or interest in any of the money or other assets of the Fund. No benefits hereunder shall be subject in any manner to anticipation, alienation, transfer, assignment, pledge, encumbrance or charge, and any attempt to so anticipate, alienate, transfer, assign, pledge, encumber or charge shall be void.

10. Investment of Funds:

The funds and assets of the Fund may, with consideration being given to expected cash requirement, be invested and reinvested in such securities as are authorized in the Commonwealth of Pennsylvania for the investment of trust funds. Further, said funds may be advanced for the purpose of purchasing or financing the purchase of real estate for use as offices and meeting place for the Local Unions, and/or other proper union purposes, in which event such advances shall be treated as loans from the Fund to the Local Unions, and shall be repaid to the Fund with interest at five (5) per cent per annum upon unpaid balances, under such other terms and conditions as shall be deemed proper by the officers of the Local Unions, subject to approval of the members.

11. Audit:

An annual audit of the Fund shall be made by a certified public accountant to be designated by said administering officers. A copy of such audit report and/or statement shall be made available for inspection by interested persons at the office of the Local Unions.

12. Administrative Acts Subject to Review by Members:

All acts, omissions to act, and decisions of the administering officers shall be reviewable and subject to change and/or revocation by action of the membership of the Union at any regular or special meeting of the membership.

RESOLUTION

WHEREAS, provisions have been made for the settlement of future unpaid claims on the Local Unions' Death Benefit Fund and;

WHEREAS, there remains on the books of the Local Unions' Death Benefit Fund certain unpaid Death Benefit claims dating back to July 1949 and;

WHEREAS, these claims have been carried over the years as a liability on the Books of the Local Unions' Death Benefit Fund due to the failure of the designated beneficiary or the various classes of successive preference beneficiaries to set forth such a claim, now

THEREFORE, BE IT RESOLVED THAT:

The trustees of the Local Unions' Death Benefit Fund make one last attempt to contact by regular mail

(a) The member's widow

(b) His surviving children

(c) His surviving parent or parents

(d) His surviving brothers or sisters in that order to set forth a claim to these outstanding unpaid death benefits, and that these benefits be paid to the first surviving class of successive preference beneficiaries as set forth above. If no such claim is filed by the above named successive preference beneficiaries within thirty (30) days from the date of the trustees' letter notifying them of their right to file such a claim, then the death benefits remaining unclaimed shall revert to the Local Unions' Death Benefit Fund absolutely.

(Adopted at General Membership Meeting of December 4, 1964.)

WILLIAM J. McELHILL,
Recording Secretary.

[Trial Exhibit P-215]

[Excerpts]

International Union
of
Operating Engineers
A.F. of L.-C.I.O.

Local Union 542-542A-542B
248 North 12th Street
Philadelphia, Pa. 19107

COLLECTIVE BARGAINING AGREEMENT

[SEAL]

May 1, 1971 to April 30, 1973

JURISDICTION

The territorial jurisdiction of Local 542-542A-542B of the International Union of Operating Engineers covers the eastern half of Pennsylvania and the State of Delaware.

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COLLECTIVE BARGAINING AGREEMENT
LOCAL UNIONS 542, 542A, 542B
INTERNATIONAL UNION OF
OPERATING ENGINEERS AFL-CIO
EFFECTIVE MAY 1, 1971 to APRIL 30, 1973

This Agreement made the —— day of ————, 1971 and effective the first day of May, 1971 by and between Local Unions 542, 542A, 542B, International Union of Operating Engineers (hereinafter referred to as Union) and

(hereinafter referred to as the Employer).

ARTICLE I

Section 1—Recognition—The Employer recognizes the Union as the collective bargaining agent for all persons performing work within the mechanical jurisdiction of the Union, whether or not any of such persons are members of the Union, provided that the provisions of this Section shall be subject to the provisions of Article V, Section 1.

Section 2—Legality—Should any of the terms or provisions of this Agreement be determined to be, or held to be, in contravention of any applicable statute or regulation enacted, promulgated or issued by any duly qualified governmental agency, any such term or provision shall be null and void, without thereby affecting any of the other terms or conditions hereof.

Section 3—Jurisdiction—The mechanical jurisdiction of the union covers the erecting, operating, dismantling and repairing of all mechanical equipment used in and about the construction of buildings and/or other construction work as awarded to the International Union of Operating Engineers by and as recognized by the Building and Construction Dept. of A. F. of L. including:

Wrecking, digging or boring type machines; street sweeping, debris and snow removal machines; mine hoists,

telpher and grab bucket machines, pumps, siphons, pulsometers; generators, concrete mixers and pumps. Stone crushers, air compressors, drilling machines, sand blasting machines, high or low pressure boilers; locomotive, tractor and truck type cranes, cherry pickers; derricks, fork lifts, boom hoists, automatic hoists and elevators (permanent or temporary), street rollers, steam and power shovels; Le Tourneau and other type scoops, pull shovels, mucking machines, draglines and cableways; clam shell and orange peel buckets when used in connection with any machine derrick or boom hoist; land and floating pile drivers; floating derrick barges, power boats, floating and self-propelled dredges and rock drilling plants; dinkey and standard locomotive, derrick cars, tractors and tractor-propelled machines; power and elevating graders, scarifiers, bulldozers, Barber-Greene loaders, trenching and ditching machines, mechanical hoe-type machines, back fillers and conveyors; electronically controlled construction equipment, all nuclear powered equipment, helicopters; remote control machines used in operating equipment, refrigerating machines when used in construction, and any other machines listed in the wage classifications herein.

The working jurisdiction of the union covers the erecting, operating, dismantling and repairing of all mechanical equipment used in and about the construction of buildings and/or other construction work. As awarded to the International Union of Operating Engineers and as recognized by the Building Construction Trades, Dept. of A. F. of L. including:

Construction, maintenance, repair and wrecking of buildings and other construction work: tunnels and subways; dams, reservoirs, disposal plants, bridges, railroads, streets (paving and repair), road building construction (including grading and repair), sewers, water, gas and oil lines; harbor and river dredging, construction and repair of all docks, wharves, piers, shipyards and sea-

walls; sand, gravel and stone pits, quarries and material yards; within jobsite clean and remove debris and snow from streets and roads; cleaning and washing of buildings; loading and unloading of construction materials and commodities within jobsite.

Section 4—Territorial Jurisdiction—The territorial jurisdiction of the Union covers the Eastern half of Pennsylvania and the State of Delaware. This Agreement shall apply to all work performed in Philadelphia, Bucks, Delaware, Chester and Montgomery Counties, Pennsylvania, (known as the "5-County Area"), and Adams, Berks, Bradford, Carbon, Columbia, Cumberland, Dauphin, Juniata, Lackawanna, Lancaster, Lebanon, Lehigh, Luzerne, Lycoming, Monroe, Montour, Northampton, Northumberland, Perry, Pike, Schuylkill, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming and York Counties, Pennsylvania (known as the "29-County Area"), and the State of Delaware, but excluding 29-County highway work which is covered under a separate agreement. When working in other areas covered by the jurisdiction of the Local Union, the Employer agrees to abide by the prevailing agreements in the area applicable to the Union and subject to Article 1, Section 3 of this Agreement.

Section 5—Term—This agreement shall be binding upon the parties hereto retroactively from May 1, 1971 to April 30, 1973.

Any renewal or extension of this agreement, or modification thereof, shall be valid only if such renewal, extension or modification is made on behalf of the Union in conformance with the provisions of Article XXIII, Subdivision 11, Section (e) of the Constitution of the International Union of Operating Engineers.

ARTICLE II

General Provisions

Section 1—Non-Discrimination—No employee, or applicant for employment, shall be discriminated against by reason of race, religion, color, or national origin.

Section 2—Hiring System:

(a) The Employer shall give the Union reasonable notice of its need for workmen, and within such period shall not hire persons not referred by the Union. If, however, the Union fails to refer workers within a 24-hour period after having been notified to do so, the Employer shall have the right to hire persons not referred by the Union.

(b) In notifying the Union of its need for workers the Employer shall specify to the Union (1) the number of workers required; (2) the location of the project; (3) the nature and type of construction involved; (4) the work to be performed; and (5) such other information as may be necessary to enable the Union to make proper referral of applicants.

(c) The employer shall have the right to determine the competency and qualifications of men referred by the Union, and the right to hire or not to hire. No employee shall be discharged except for just cause.

(d) The selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, Union membership, by-laws, regulations, constitutional provisions or any other aspect or obligation of Union membership, policies or requirements, except as outlined in this Agreement.

(e) The Union shall register and refer all applicants for employment on the basis of the priority groups listed below. Each applicant shall be registered in the highest priority group for which he qualifies.

GROUP I

Group I shall consist of all those applicants who are under Group I and who have qualified for same as of May 1, 1963, and all applicants who have worked within the geographical area of the Eastern half of the State of Pennsylvania and the State of Delaware five thousand (5,000) hours within the past eight (8) years; or two thousand five hundred (2,500) hours for the past three (3) years. All applicants shall be entitled to priority under Group I who would have qualified for any of the foregoing classifications were it not for absence due to military service, or service as a Union official, or to disability within the provisions of Local 542 Operating Engineers Welfare Plan, or under the provisions of any compensations law. Union officials shall be entitled to a credit of forty (40) hours per week during service in office in determining their eligibility for preference in Group I.

All applicants who are indentured under the Apprentice Program shall be qualified under Group I as long as they remain within the Apprentice Program. All apprentices upon completion of their apprentice training shall be qualified under Group I.

In determining the eligibility of all applicants, the records of Local 542 Operating Engineers Welfare Plan shall be relevant for all periods covered by such records.

GROUP I-A

Group I-A—Shall be reserved for such jobs that are not physically demanding. This normally would be equipment such as compressors, welding machines, generators, heaters, etc. But recognizing that such or similar jobs may be physically demanding in certain instances, the employer will discuss the details of such or similar jobs with the Union in order to place the job in the proper category.

Registration on Group I-A out-of-work list will be voluntary and will be restricted to those who are fifty (50) years of age or over, and who have been continuously in Group I for a period of fifteen (15) years or more, or those who are physically handicapped and who are unable to pursue their normal occupational classification. A doctor's certificate and/or release shall be presented to the Union for proper Group Classification. When a man is on the Group I-A list, his name cannot be transferred to any other Group for a period of ninety (90) calendar days, and then his name shall go to the bottom of the Group list to which he is being transferred, excepting those who are in Group I-A because of a temporary physical handicap.

The same requirements will prevail on the job after a period of fourteen (14) calendar days. A job steward may cover equipment in Group I-A without regard to the above requirements for the mutual benefit of the Employer and the Union. This clause will not affect the status of any jobs so manned on May 1, 1971. Any employee may be moved by Employer without regard to classification during the period of November 15 through March 15, with prior permission of the union.

GROUP II

Group II shall consist of all those applicants who qualify for any of the following: All applicants who have worked within the geographical area of the Eastern half of the State of Pennsylvania and the State of Delaware twenty-five hundred (2,500) hours within the past twelve (12) years; four hundred (400) hours per year during any three of the past five (5) years; or four hundred (400) hours during the past year.

GROUP III

Group III shall consist of all other applicants for employment.

(f) The Union shall maintain a separate list for each of the four groups set forth above, and shall list the applicants within each group in the order in which they register as available for employment.

(g) In referring applicants to the Employer, the Union shall first refer applicants in Group I in the order of their places on the list, and then refer applicants in the same manner successively from the lists, for Groups II and III or in Group I-A if applicable. Any applicant who is rejected by the Employer shall be restored to his place on the list for his group. When a registrant is referred for employment and is actually employed on a job for more than a period of 14 calendar days, such registrant's name shall be removed from the list. When his employment terminates, he shall be registered at the bottom of the appropriate group list on which he is entitled to be registered. If a registrant, upon being referred for employment in regular order, refuses to accept the employment, without reasonable excuse, such registrant's name shall be placed at the bottom of the group list on which he is registered.

(h) Re-registration for referral shall be accepted by the Union at any time during its customary office hours. New registrations shall be accepted by the Union at least once each week during office hours. Reasonable notice of new registration periods shall be posted by the Union in the Union office and in any other place where notices to employees and applicants for employment are customarily posted.

* * * *

available in the locality. No party to this Agreement shall rent or supply equipment unmanned to anyone doing construction work covered by this agreement who is not in signed relations with this Union.

(b) No employee represented by this Union on construction work shall be required to operate equipment of

or for any Employer who has any interest in a firm or company doing construction work within the jurisdiction of this Union and which is not in signed relations with this Union.

Section 12—New Machines—Any new machine which may be introduced into the industry which performs the work done by the currently existing machines within the jurisdiction of the International Union of Operating Engineers, shall be within the jurisdiction of the International Union of Operating Engineers, and if not covered by existing schedule shall be the subject of negotiations between Local 542 International Union of Operating Engineers and the appropriate association signatory to this Agreement as to manning and wage rates.

ARTICLE III

Construction Definitions

Section 1—Building Construction—Building Construction shall include office buildings, manufacturing plants, including heating plants, refineries, warehouses, hospitals, theatres and auditoriums of all kinds, sports stadiums, race tracks, department stores, schools, churches, hotels, apartment houses, buildings accessory to public utilities, such as railroad stations, roundhouses, repair shops, telephone exchanges, bus terminals and the like, post offices, courthouses and other municipal and governmental buildings of all kinds and character, and the excavations for and demolition of all of the foregoing, and snow removal during construction.

The Building Rate shall apply to all work performed on the building job site and to any temporary off-site plants servicing the building job site. Where the temporary off-site plant services more than one job and the majority of the work performed by the said off-site plant is for building construction work (within the definitions herein set forth) then the building rate shall apply to

all work performed at the said off-site plant; however, if the majority of work performed at any such temporary off-site plant is for heavy construction or highway construction (within the definitions herein set forth) then the appropriate heavy construction or highway construction rate of pay shall be applicable.

Section 2—Heavy Construction—Heavy Construction shall include bridges and viaducts, airports, subways, tunnels, caverns and shafts, railroad and railways, reservoirs, dams, water supply and irrigation projects, reclamation and flood control projects, water power and hydro-electric projects, sewage disposal and filtration and water treatment plants, bulkheads and retaining walls, swimming pools, athletic fields, site work, playgrounds, cross-country transmission lines, underground conduits, substations, and all work connected therewith, and any other construction not defined as building construction or highway construction and the ex- * * *

* * * *

[Trial Exhibit P-216]

[Excerpts]

INTERNATIONAL UNION
OF
OPERATING ENGINEERS
A.F. of L. - C.I.O.

Local Union 542-542A-542B
248 North 12th Street
Philadelphia, Pa. 19107

COLLECTIVE BARGAINING
AGREEMENTS

[SEAL]

May 1, 1968 to April 30, 1971

JURISDICTION

The territorial jurisdiction of Local 542-542A-542B of the International Union of Operating Engineers covers the eastern half of Pennsylvania and the State of Delaware.

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COLLECTIVE BARGAINING AGREEMENT
LOCAL UNIONS 542, 542-A, and 542-B
INTERNATIONAL UNION OF OPERATING ENGINEERS
A.F. of L.-C.I.O.

EFFECTIVE MAY 1, 1968 to APRIL 30, 1971

THIS AGREEMENT, made this 29th day of May 1968 and effective the FIRST day of MAY 1968, by and between LOCAL UNIONS 542, 542A and 542B, INTERNATIONAL UNION OF OPERATING ENGINEERS (hereinafter referred to as "Union") and THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, UNITED CONTRACTORS ASSOCIATION and THE PENNSYLVANIA EXCAVATING CONTRACTORS ASSOCIATION and their individual members and employers affiliated therewith or for whom said Associations bargain and represent, whose names are set forth on Exhibit "A" hereto attached (hereinafter referred to as the "Employer").

WITNESSETH

ARTICLE I

Jurisdiction

Section 1: The Employer recognizes the Union as the collective bargaining agent for all persons performing work within the mechanical jurisdiction of the Union, whether or not any of such persons are members of the Union, provided that the provisions of this Section shall be subject to the provisions of Article VI, Section 1.

Section 2: The mechanical jurisdiction of the Union covers the erecting, operating, dismantling and repairing of all mechanical equipment used in and about the construction of buildings and/or other construction work as

awarded to the International Union of Operating Engineers by, and as recognized by, the Building and Construction Trades Department of the American Federation of Labor. It is understood that any awards made under Article VI, Section 1, adding to or subtracting from this jurisdiction shall be honored by the parties hereto.

Section 3: The territorial jurisdiction of the Union covers the eastern half of Pennsylvania and the State of Delaware. This agreement shall apply to all work performed in Philadelphia, Delaware, Bucks, Chester and Montgomery Counties. When working in other areas covered by jurisdiction of the Union, the Employer agrees to abide by existing agreements in the area entered into between this Union and the collective bargaining agent for employers in the area.

ARTICLE II

General Provisions

Section 1: Should any of the terms or provisions of this agreement be determined to be, or held to be, in contravention of any applicable statute or regulation enacted, promulgated or issued by any duly qualified governmental agency, any such term or provisions shall be null and void, without thereby affecting any of the other terms or conditions hereof.

Section 2: Hiring System

(a) The Employer shall give the Union reasonable notice of its need for workmen, and within such period shall not hire persons not referred by the Union. If, however, the Union fails to refer workers within a 24-hour period after having been notified to do so, the Employer shall have the right to hire persons not referred by the Union.

(b) In notifying the Union of its need for workers the Employer shall specify to the Union (1) the number of workers required; (2) the location of the project; (3) the

nature and type of construction involved; (4) the work to be performed; and (5) such other information as may be necessary to enable the Union to make proper referral of applications.

(c) The Employer shall have the right to determine the competency and qualifications of men referred by the Union, and the right to hire or not to hire.

(d) The selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, Union membership, by-laws, regulations, constitutional provisions or any other aspect or obligation of Union membership, policies or requirements.

(e) The Union shall register and refer all applicants for employment on the basis of the priority groups listed below. Each applicant shall be registered in the highest priority group for which he qualifies.

GROUP I

GROUP I shall consist of all those applicants who are under Group I and who have qualified for same as of May 1, 1963, and all applicants who have worked within the geographical area of the Eastern half of the State of Pennsylvania and the State of Delaware five thousand (5,000) hours within the past eight (8) years; or two thousand five hundred (2,500) hours for the past three (3) years. All applicants shall be entitled to priority under Group I who would have qualified for any of the foregoing classifications were it not for absence due to military service, or service as a Union official, or to disability within the provisions of Local 542 Operating Engineers Welfare Plan, or under the provisions of any compensations law. Union officials shall be entitled to a credit of forty (40) hours per week during service in office in determining their eligibility for preference in Group I.

There shall be a joint Committee consisting of three men appointed by the Union and three by the Employer to compile a list showing the experience and background of all eligible employees for the various categories in each of the districts.

All applicants who are indentured under the Apprentice Program shall be qualified under Group I as long as they remain within the Apprentice Program. All apprentices upon completion of their apprentice training shall be qualified under Group I.

In determining the eligibility of all applicants, the records of Local 542 Operating Engineer Welfare Plan shall be relevant for all periods covered by such records.

GROUP I-A

GROUP I-A—Shall be reserved for such jobs that are not physically demanding. This normally would be equipment such as compressors, welding machines, generators, heaters, etc. But recognizing that such or similar jobs may be physically demanding in certain instances, the Employer will discuss the details of such or similar jobs with the Union in order to place the job in the proper category.

Registration on Group I-A out-of-work list will be voluntary and will be restricted to those who are fifty (50) years of age or over, and who have been continuously in Group I for a period of fifteen (15) years or more, or those who are physically handicapped and who are unable to pursue their normal occupational classification. A doctor's certificate and/or release shall be presented to the Union for proper Group Classification. When a man is on the Group I-A list, his name cannot be transferred to any other Group for a period of ninety (90) calendar days, and then his name shall go to the bottom of the Group list to which he is being transferred, excepting

those who are in Group I-A because of a temporary physical handicap.

The same requirements will prevail on the job after a period of fourteen (14) calendar days. A job steward may cover equipment in Group I-A without regards to the above requirements for the mutual benefit of the Employer and the Union. This clause will not affect the status of any jobs so manned on May 1, 1968. Any employee may be moved by the Employer without regard to classification during the period of November 15th through March 15th after notification to the Union.

GROUP II

GROUP II shall consist of all those applicants who qualify for any of the following categories: All applicants who have worked within the geographical area of the Eastern half of the State of Pennsylvania and the State of Delaware twenty-five hundred (2,500) hours within the past twelve (12) years; four hundred (400) hours per year during any three of the past five years; or four hundred (400) hours during the past year.

GROUP III

GROUP III shall consist of all other applicants for emploment.

(f) The Union shall maintain a separate list for each of the four groups set forth above, and shall list the applicants within each group in the order in which they register as available for employment.

(g) In referring applicants to the Employer, the Union shall first refer applicants in Group I in the order of their places on the list, and then refer applicants in the same manner successively from the lists, for Groups II and III or in Group I-A if applicable. Any applicant who is rejected by the Employer shall be restored to his place on the list for his group. When a registrant is referred for employment and is actually employed on a

job for more than a period of 14 calendar days, such registrant's name shall be removed from the list. When his employment terminates, he shall be registered at the bottom of the appropriate group list on which he is entitled to be registered. If a registrant, upon being referred for employment in regular order, refuses to accept the employment, without reasonable excuse, such registrant's name shall be placed at the bottom of the Group list on which he is registered.

(h) Re-registration for referral shall be accepted by the Union at any time during its customary office hours. New registrations shall be accepted by the Union at least once each week during office hours. Reasonable notice of new registration periods shall be posted by the Union in the Union office and in any other place where notices to employees and applicants for employment are customarily posted.

(j) The Union will use its best efforts to notify an applicant for referral when such applicant is to be referred to a job pursuant to the request of the Employer, but assumes no obligation or responsibility for failure to locate such applicant.

(j) The priorities of referral set forth in paragraph (e) above shall be followed except that in cases where the Employer requires and calls for employees possessing special skills and abilities, the Union shall pass over any applicants on the register not possessing such special skills and abilities.

(k) The Employer reserves the right to request through the Union any employee laid off within the preceding 90 calendar days. The employee so requested shall have the right to accept or reject such employment.

In any one classification on any one job, an operator in Group I cannot be laid off before men in Group III or II unless in the opinion of the contractor, the operator in the lower group has certain skills that the operator in

the higher group does not possess. Recall of people for any particular classification for Group II or III cannot be made (recalled) unless all people subject to recall by the contractor in Group I has been made unless in the opinion of the contractor the operator in the lower group has certain skills that the operator in the higher group does not possess.

(l) The Union shall require all job applicants to submit a resume of experience and qualifications.

(m) In the event any job applicant is aggrieved with respect to the functioning of this hiring agreement, he may within ten (10) days following the occurrence of the event which constitutes the basis for grievance, file with the person in charge of registration and referral a written statement of the grievance clearly and specifically setting forth the wrong or violation charged. An Appellate Tribunal consisting of an Employer Representative, a Union Representative and an Impartial Chairman appointed jointly by the Employer and Union, shall consider such grievance and render decisions which shall be binding. The Appellate Tribunal is authorized to issue procedural rules for the conduct of its business but is not authorized to add to, subtract from, or modify any of the provisions of this agreement and its decision shall be in accord with the agreement.

(n) The Union and the Employer shall post in places where notices to employees and applicants for employment are customarily posted all provisions of this hiring hall arrangement. This provision shall be operative only if required by law.

(o) Service Fees: Notwithstanding any other provision in this agreement, it shall be a condition of employment, and/or registration for employment, that all employees and prospective employees covered by this agreement who are not members of the Union, shall be required to pay a service fee of $24.00 or such other amount as may hereafter be agreed upon at the time of registration,

and no more frequently than on a calendar quarterly basis, thereafter payable in advance, in consideration of the services performed by the Union, including the negotiations and enforcement of Collective Bargaining Agreements, the maintenance of hiring halls, the other Union activities performed for the general interest of all employees in the bargaining unit. The failure to pay such quarterly service fees shall be sufficient grounds for removal from the Union referral list and shall nullify any prior referral therefrom.

Section 3. The employer association named herein is negotiating agent for its present and future members. The Union shall be notified of all future members immediately that they are admitted into the Association. For the breach of this agreement, the liability of the mem' ers of the employer association shall be several and not joint. No member of the association may withdraw from this contract before the end of its termination date.

Section 4. The business manager and business agents of the Union shall be the only authorized agents of the Union to be recognized by the Employer, but the business manager and business agents of the Union shall not be empowered to bind the membership of the Union without their approval on those matters where membership approval is necessary, such as in the formulation and execution of contracts. The power and duties of Union stewards shall be limited to reporting any practices on the job which do not conform with this contract. The Employer shall notify the Union when the steward is laid off.

Section 5. Welfare Fund. The Employer shall pay into a Health and Welfare Fund, established in accordance with the understanding and agreements between the parties hereto, the sum of (.15) fifteen cents for each hour for which payments of wages or guaranteed compensation has been made to every operating engineer,

oiler apprentice engineer employed by the Employer throughout the period of this contract. Effective November 1, 1969 payment shall be (.20) twenty cents for each hour for which payment of wages has been made as described herein. In calculating contributions, all fractions of hours will be paid for as full hours. The Employer shall further submit on forms provided for that purpose, such information concerning the details of his contributions and the hours worked by operating engineers in its employ as is necessary for the sound administration and operation of the Health and Welfare Fund. Such reports and payments shall be made monthly and not later than the fifteenth day of the month following the period covered by such reports.

Section 6. Pension Fund. The Employer shall pay into a Pension Fund established in accordance with the understanding and agreements between the parties hereto, the sum of twenty-five (.25) cents for each hour for which payment of wages or guaranteed compensation has been made to every operating engineer, oiler and apprentice engineer employed by the Employer unless revised by further agreement between the parties. Effective November 1, 1968 payments shall be (.35) thirty-five cents for each hour for which payment of wages or guaranteed compensation has been made as described above. In calculating contributions, calculations shall be in accordance with Article II, Section 5. The Employer shall further submit, on forms provided for that purpose, such information concerning the details of his contribution and the hours worked by operating engineers in his employ as is necessary for the sound administration and operation of the Pension Fund. Such reports and payments shall be made monthly not later than the fifteenth day of the month following the period covered by such reports.

Section 7. All welfare and Pension Reports and payments are due by the 15th but not later than the 25th

of the month. Reports received in the office of the Joint Funds after the 25th will be subject to a fine of twenty (20) dollars to each Fund. In the event the delinquency continues until the 15th of the next succeeding month, there will be due, in addition to the fore- * * *

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Section 3. Highway Construction. Highway Construction shall include sewers, culverts, roads, streets, water pipes and duct lines, curbs, gutters, sidewalks and pipe lines, except pipe lines or water lines within the area of a refinery or some other plant installation, and the excavations for all of the foregoing. Demolition of any structure required in connection with highway construction and not defined in Sections I and II above shall be performed under the Highway Agreement. Demolition of structures defined in Sections I and II above required to be performed in connection with Highway Construction shall be performed under the agreement relating thereto.

Section 4. Temporary offsite plants shall be regarded as "building construction", "heavy construction" or "highway construction", depending upon the project to which a greater part (in excess of fifty percent) of the products of the plant are devoted and the terms and conditions of the particular contract applicable to that type of construction shall apply.

ARTICLE IV

Wages and Conditions Applicable to Heavy Construction

Section 1. The Wage Scale. All Classifications and wage rates as covered by this agreement, shall be set forth in Schedule I (Heavy Construction) attached hereto and by this reference made a part hereof.

Section 2. When seven (7) or more engineers are employed on any one project by the Employer, a Master Mechanic shall be employed.

When rented equipment is used on a project with the operator on the equipment owner's or lessee's payroll, the operator must be counted in the total number of engineers employed on a project toward hiring of a Master Mechanic.

The Master Mechanic shall, under the direction of Maagement, supervise and assist in the operation, maintenance and repair of all equipment coming under the jurisdiction of the Operating Engineers. He shall also make minor repairs to equipment not requiring the services of an engineer.

An Assistant Master Mechanic shall be employed where 25 or more employees are employed on any one project of an employer. There shall be no restrictions upon the duties to be performed by him as a mechanic. He shall not be required to operate equipment.

Section 3. Weekly Pay. When an engineer or apprentice reports for starting work, he shall be entitled to work until the end of his job and shall not be replaced before the conclusion of his job except for just cause. If his job continues for more than five (5) days, said employee shall be on a forty (40) hour weekly guarantee basis at the weekly rate for the elapsed working days while his job lasts. If re-hired before the expiration of one week, he shall be compensated for time lost.

Section 4. Employment on a Daily Basis. Engineers and apprentices employed on the daily basis shall, unless notified at or before the termination of the preceding period, report for work at the regular period. If not started work within 1 hour at the scheduled starting time, he shall be dismissed for the period and shall re-

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[Trial Exhibit P-217(a)]

[EXCERPTS]

INTERNATIONAL UNION
OF
OPERATING ENGINEERS
AFL-CIO

Local Union 542-542A-542B
248 North 12th Street
Philadelphia, Pa. 19107

COLLECTIVE BARGAINING
AGREEMENTS

[SEAL]

May 1, 1965 to April 30, 1968

JURISDICTION

The territorial jurisdiction of Local 542-542A-542B of the International Union of Operating Engineers covers the eastern half of Pennsylvania and the State of Delaware.

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FIVE COUNTY
HEAVY & HIGHWAY
COLLECTIVE BARGAINING AGREEMENT
LOCAL UNIONS 542, 542-A, AND 542-B
INTERNATIONAL UNION OF OPERATING ENGINEERS
AFL-CIO
EFFECTIVE MAY 1, 1965 to APRIL 30, 1968
(DISTRICT 1)

THIS AGREEMENT, made this 5th day of May, 1965, and effective the FIRST day of MAY, 1965, by and between LOCAL UNIONS 542, 542A and 542B, INTERNATIONAL UNION OF OPERATING ENGINEERS (hereinafter referred to as "Union") and THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, UNITED CONTRACTORS ASSOCIATION, and THE PENNSYLVANIA EXCAVATING CONTRACTORS ASSOCIATION and their individual members and employers affiliated therewith or for whom said Associations bargain and represents, whose names are set forth on Exhibit "A" hereto attached (hereinafter referred to as the "Employer").

WITNESSETH

ARTICLE I

Jurisdiction

Section 1: The Employer recognizes the Union as the collective bargaining agent for all persons performing work within the mechanical jurisdiction of the Union, whether or not any of such persons are members of the Union, provided that the provisions of this Section shall be subject to the provisions of Article VI, Section 1.

Section 2: The mechanical jurisdiction of the Union covers the erecting, operating, dismantling and repairing of all mechanical equipment used in and about the con-

struction of buildings and/or other construction work as awarded to the International Union of Operating Engineers by, and as recognized by, the Building and Construction Trades Department of the American Federation of Labor. It is understood that any awards made under Article VI, Section 1, adding to or subtracting from this jurisdiction shall be honored by the parties hereto.

Section 3: The territorial jurisdiction of the Union covers the eastern half of Pennsylvania and the State of Delaware. This agreement shall apply to all work performed in Philadelphia, Delaware, Bucks, Chester and Montgomery Counties. When working in other areas covered by jurisdiction of the Union, the Employer agrees to abide by existing agreements in the area entered into between this Union and the collective bargaining agent for employers in the area.

ARTICLE II

General Provisions

Section 1: Should any of the terms of provisions of this agreement be determined to be, or held to be in contravention of any applicable statute or regulation enacted, promulgated or issued by any duly qualified governmental agency, any such term or provisions shall be null and void, without thereby affecting any of the other terms or conditions hereof.

Section 2: Hiring System

(a) The Employer shall give the Union reasonable notice of its need for workmen, and within such period shall not hire persons not referred by the union. If, however, the Union fails to refer workers within a 24-hour period after having been notified to do so, the Employer shall have the right to hire persons not referred by the Union.

(b) In notifying the Union of its need for workers the Employer shall specify to the Union (1) the number of workers required; (2) the location of the project; (3) the nature and type of construction involved; (4) the work to be performed; and (5) such other information as may be necessary to enable the Union to make proper referral of applications.

(c) The Employer shall have the right to determine the competency and qualifications of men referred by the Union, and the right to hire or not to hire.

(d) The selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, Union membership, by-laws, regulations, constitutional provisions or any other aspect or obligation of Union membership, policies or requirements.

(e) The Union shall register and refer all applicants for employment on the basis of the priority groups listed below. Each applicant shall be registered in the highest priority group for which he qualifies.

GROUP 1

GROUP I shall consist of all those applicants who are under Group I and who have qualified for same as of May 1, 1963, and all applicants who have worked within the geographical area of the Eastern half of the State of Pennsylvania and the State of Delaware five thousand (5,000) hours within the past eight (8) years; or two thousand, five hundred (2,500) hours for the past three (3) years. All applicants shall be entitled to priority under Group I who would have qualified for any of the foregoing classifications were it not for absence due to military service, or service as a Union official, or to disability within the provisions of Local 542 Operating Engineers Welfare Plan, or under the provisions of any compensation law. Union officials shall be entitled to a

credit of forty (40) hours per week during service in office in determining their eligibility for preference in Group I.

There shall be a joint Committee consisting of three men appointed by the Union and three by the Employer to compile a list showing the experience and background of all eligible employees for the various categories in each of the districts.

All applicants who are indentured under the Apprentice Program shall be qualified under Group I as long as they remain within the Apprentice Program. All apprentices upon completion of their apprentice training shall be qualified under Group I.

In determining the eligibility of all applicants, the records of Local 542 Operating Engineers Welfare Plan shall be relevant for all periods covered by such records.

GROUP II

GROUP II shall consist of all those applicants who qualify for any of the following categories: All applicants who have worked within the geographical area of the Eastern half of the State of Pennsylvania and the State of Delaware twenty-five hundred (2,500) hours within the past twelve (12) years; four hundred (400) hours per year during any three of the past five years; or four hundred (400) hours during the past year.

GROUP III

GROUP III shall consits of all other applicants for employment.

(f) The Union shall maintain a separate list for each of the three groups set forth above, and shall list the applicants within each group in the order in which they register as available for employment.

(g) In referring applicants to the Employer, the Union shall first refer applicants in Group I in the order of their places on the list, and then refer applicants in the same manner successively from the lists, for Groups II and III. Any applicant who is rejected by the Employer shall be restored to his place on the list for his group. When a registrant is referred for employment and is actually employed on a job for more than a period of two weeks, such registrant's name shall be removed from the list. When his employment terminates, he shall be registered at the bottom of the appropriate group list on which he is entitled to be registered. If a registrant, upon being referred for employment in regular order, refuses to accept the employment, without reasonable excuse, such registrant's name shall be placed at the bottom of the Group list on which he is registered.

(h) Re-registrations for referral shall be accepted by the Union at any time during its customary office hours. New registrations shall be accepted by the Union at least once each week during office hours. Reasonable notice of new registration periods shall be posted by the Union in the Union office and in any other place where notices to employees and applicants for employment are customarily posted.

(i) The Union will use its best efforts to notify an applicant for referral when such applicant is to be referred to a job pursuant to the request of the employer, but assumes no obligation or responsibility for failure to locate such applicant.

(j) The priorities of referral set forth in paragraph (e) above shall be followed except that in cases where the Employer requires and calls for employees possessing special skills and abilities, the Union shall pass over any applicants on the register not possessing such special skills and abilities.

(k) The Employer reserves the right to request through the Union any employee laid off within the pre-

ceding three (3) months. The employee so requested shall have the right to accept or reject such employment.

(l) The Union shall require all job applicants to submit a resume of experience and qualifications.

(m) In the event any job applicant is aggrieved with respect to the functioning of this hiring agreement, he may within ten (10) days following the occurrence of the event which constitutes the basis for grievance, file with the persons in charge of registration and referral a written statement of the grievance clearly and specifically setting forth the wrong or violation charged. An Appellate Tribunal consisting of an Employer Representative, a Union Representative and an Impartial Chairman, appointed jointly by the Employer and Union, shall consider such grievance and render decisions which shall be binding. The Appellate Tribunal is authorized to issue procedural rules for the conduct of its business but is not authorized to add to, subtract from, or modify any of the provisions of this agreement and its decision shall be in accord with the agreement.

(n) The Union and the Employer shall post in places where notices to employees and applicants for employment are customarily posted all provisions of this hiring hall arrangement. This provision shall be operative only if required by law.

(o) Service Fees: Notwithstanding any other provision in this agreement, it shall be a condition of employment, and/or registration for employment, that all employees and prospective employees covered by this agreement who are not members of the Union, shall be required to pay a service fee of $24.00 or such other amount as may hereafter be agreed upon, at the time of registration, and no more frequently than on a calendar quarterly basis, thereafter payable in advance, in consideration of the services performed by the Union, including the negotiations and enforcement of Collective

Bargaining Agreements, the maintenance of hiring halls, the other Union activities performed for the general interest of all employees in the bargaining unit. The failure to pay such quarterly service fees shall be sufficient grounds for removal from the Union referral list and shall nullify any prior referral therefrom.

Section 3: The employer association named herein is negotiating agent for its present and future members. The Union shall be notified of all future members immediately that they are admitted into the association. For the breach of this agreement, the liability of the members of the employer association shall be several and not joint. No member of the association may withdraw from this contract before the end of its termination date.

Section 4: The business manager and business agents of the Union shall be the only authorized agents of the Union to be recognized by the Employer, but the business manager and business agents of the Union shall not be empowered to bind the membership of the Union without their approval on those matters where membership approval is necessary, such as in the formulation and execution of contracts. The power and duties of Union stewards shall be limited to reporting any practices on the job which do not conform with this contract. The Employer shall notify the Union when the steward is laid off.

Section 5: Welfare Fund. The Employer shall pay into a Health and Welfare Fund, established in accordance with the understandings and agreements between the parties hereto, the sum of (.15) fifteen cents for each hour for which payment of wages or guaranteed compensation has been made to every operating engineer, oiler and apprentice engineer employed by the Employer throughout the period of this contract. In calculating contributions, all fractions of hours will be paid for as full hours. The Employer shall further submit on forms provided for that purpose, such information concerning

the details of his contributions and the hours worked by operating engineers in its employ as is necessary for the sound administration and operation of the Health and Welfare Fund. Such reports and payments shall be made monthly and not later than the fifteenth day of the month following the period covered by such reports.

Section 6: Pension Fund. The Employer shall pay into a Pension Fund established * * *

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as covered by this agreement, shall be set forth in Schedule II (Highway Construction) attached hereto and by this reference made a part hereof.

Section 2. When seven (7) or more engineers are employed on any one project by the Employer, a Master Mechanic shall be employed.

When rented equipment is used on a project with the operator on the equipment owner's or lessee's payroll, the operator must be counted in the total number of engineers employed on a project toward hiring of a Master Mechanic.

The Master Mechanic shall, under the direction of Management, supervise and assist in the operation, maintenance and repair of all equipment coming under the jurisdiction of the Operating Engineers. He shall also make minor repairs to equipment no requiring the services of an engineer.

An Assistant Master Mechanic shall be employed where 25 or more employees are employed on any one project of an Employer. There shall be no restrictions upon the duties to be performed by him as a mechanic. He shall not be required to operate equipment.

Section 3: Weekly Pay. When an engineer or apprentice reports for starting work, he shall be entitled to work until the end of his job and shall not be replaced before the conclusion of his job except for just cause. If

his job continues for more than five (5) days, said employee shall be on a forty (40) hour weekly guarantee basis at the weekly rate for the elapsed working days while his job lasts. If rehired before the expiration of one week, he shall be compensated for time lost.

Section 4: Employment on a Daily Basis.

Engineers and apprentices employed on the daily basis shall, unless notified at or before the termination of the preceding period, report for work at the regular period. If not started work at the scheduled starting time, he shall be dismissed for the period and shall receive pay for two (2) hours' time. If started to work he shall receive eight (8) hours' pay.

Section 5: Employees covered by this agreement shall be paid by cash or check at the option of the Local Union each week at or before quitting time on the regular pay day. The Employers shall not be permitted to retain more than three (3) days pay. Such employees not paid promptly on the regular pay day or when dismissed shall be paid waiting time until paid, except where the delay is for reasons beyond the Employers' control. Such waiting time shall not exceed eight (8) hours. Members of the Associations signatory to this agreement can pay by check.

Section 6: Employees covered by this agreement may be shifted only once during a day from a first to a second machine, and shall finish the day on the second machine, and they shall receive the higher rate of pay for the day.

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[Exhibit P-168]

REPORT NO. 4

THE REFERRAL SYSTEM, JOB TERMINATIONS AND EMPLOYER HOURS

Dr. Bernard Siskin
Temple University
October 3, 1973

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Summary and Conclusions

1. This report analyzes the referral system of Local 542 of the IUOE and the hours of work reported by firms which employ persons belonging to or associated with the union. The period covered by this report is 1969-1971.

2. Part I of the report analyzes the referral system. The number of referrals for District 1 were broken down by race for the 1969-1971 period. The outcomes of referrals by race, in terms of the proportion resulting in persons being hired, were then examined. With respect to these successful referrals, the reasons for termination were examined and frequency distributions were calculated by race and evaluated. Finally, the companies to whom referrals were made were examined to determine what proportion of these companies received and hired minority referrals.

Part II of this report examines the hours reported by employers for all districts. The number of active firms with no minority hours for the 1969-1971 period was developed, as was the percentage of hours worked by minorities.

3. My results may be summarized as follows:

(a) Minorities constituted 6.5 percent of the pool from which referrals were made but received only 5.5 percent of the referrals. Whites in the pool received an average of 6.68 referrals, compared to an average of 5.65 referrals for minorities. These differences by race are statistically significant at below the one in one million level.

(b) There was no significant difference in referral outcomes by race. 93.6 percent of minority referrals resulted in employment, and 93.0 percent of white referrals resulted in employment.

(c) There was no significant difference in the frequency distributions of job termination reasons by race. 80.82 percent of minority terminations, and 80.28 percent of white terminations, were due to lay-offs. The remaining cases of termination are distributed in virtually the same proportions for whites and minorities.

(d) Of the 1327 firms which got referrals from the District 1 hiring hall, 1003, or 75.6 percent, got only white referrals. The racial distribution of persons referred to and hired by the firms was: 1018, or 76.7 percent, hired whites only; 35, or 2.6 percent, hired minorities only; and 274, or 21.7 percent, hired both whites and minorities.

(e) Of the firms which never hired minorities during the period, 15 were referred at least one minority person.

(f) The union records listed 1488 employers who reported hours worked by persons belonging to or associated with Local 542 during the period. Of these, 1036, or 69.6 percent, reported no minority hours.

(g) For each year during the period, the percentage of firms reporting no minority hours was: 74.8 percent in 1969; 71.8 percent in 1970; and 73.1 percent in 1971.

(h) For each year during the period, the percentage of reported hours worked by minorities was: 3.58 percent in 1969; 3.70 percent in 1970; and 3.62 percent in 1971.

Data Base

4. The data used in Part I was extracted from the Local 542 District 1 work records in a coding project which I directed.

The work records were first xeroxed at the union hiring hall, and the copies were taken to the offices of Community Legal Services, where the coding took place.

A coding sheet[1] was developed by me in co-operation with the coding supervisor, Ms. Judith Kates. For each person on whom there was information,[2] the following data was transposed by the coders from the work record onto the coding sheet:

(1) Name;

(2) Social security number;

(3) All referrals, including:

(i) Date of each referral;

(ii) Company (each employer being assigned a discrete code);

(iii) Date of each termination;

(iv) Reason for each termination;

(4) All job refusals; and

(5) If the person was referred to the same employer within 90 days of termination, a "recall" was noted.

The coding was supervised by Ms. Kates. A total of 20 coders were employed, with no more than 6 working at any one time. The coders were graduates or under-graduates at Temple University. Two independent accuracy checks were conducted. First, the work of each new coder was checked by the supervisor until the coder did a perfect job for an entire day. Second, after the coding was completed, the coding sheets were arranged alphabetically, and every tenth sheet was checked for accuracy against the work records. The result of this final check was that the coding was found to be more than 99 percent accurate.

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[1] A sample coding sheet is attached in the Appendix to this report.

[2] Since the information was taken from the hiring hall records, members in the C and D branches, who obtain work directly from employers, are not included.

Upon completion of the coding process, the information on the coding sheets was punched onto computer cards by a professional key-punch organization. This organization conducted a 100% verification check of the key-punching. The race of each person was then placed in the computer bank from a list supplied by the union.

5. The data used Part II of this report, dealing with company hours, was copied directly from union records of employer hours aggregated yearly in the health, welfare and pension records.[3] To calculate the hours by race, the individual health, welfare and pension records of minorities were examined, and the hours by year by employer for each minority person were copied.[4]

PART 1

REFERRALS AND TERMINATIONS[5]

Referrals

6. For the 1969-1971 period, the District 1 files contained a total of 3475 work records. Of these 227, or 6.5 percent, were records of minorities.

7. The union files show the following distribution of referrals by race for these 3475 cases.[6]

TABLE 1

Referrals by Race 1969-1971

	Number of Referrals	Percent
Whites	21,692	94.5
Minorities	1,282	5.5
Total	22,974	100.0

[3] A subsequent accuracy check of every tenth record showed fewer than 1 percent errors in transcription.

[4] The same accuracy check as in fn. (3) was conducted, with the same result.

[5] This data is for District I only.

[6] Recalls (see p. 4), are not included.

We thus see that although minorities represented 6.5 percent of the pool, they accounted for only 5.5 percent of the referrals. In terms of averages, whites received an average of 6.68 referrals, compared to an average of 5.65 referrals for blacks. The difference in average number of referrals by race is statistically significant at below the one in one million level.[7]

Referral Outcomes

8. The outcomes of referrals is given in the following table, which shows the number and proportion of referrals by race resulting in employment.

TABLE 2

Referral Outcomes by Race

	Number of Referrals	Number Resulting in Employment	Percent Resulting in Employment
Whites	21,692	20,174	93.0
Minorities	1,282	1,200	93.6

Thus, approximately the same proportion of white and minority referrals result in employment. The difference is not statistically significant.

Reasons for Job Termination

9. The work records also contain, for the successful referrals, the date upon which the person left the job and the reason assigned for termination. For the 1969-1971 period, there were a total of 20,643 cases of persons leaving jobs which were noted on the work records. The following table gives the distributions of assigned termination reasons for whites and minorities during this period.

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[7] This calculation assumes that placement on the out-of-work lists operates randomly by race.

TABLE 3

Distribution of Reasons for
Job Termination by Race, 1969-1971

	Whites		Minorities	
	Number	Percent of Total Whites	Number	Percent of Total Minorities
Lay-off	15,635	80.28	944	80.82
Strike	513	2.63	26	2.23
Job Cancelled	307	1.58	22	1.88
Quit	715	3.67	23	1.97
Fired	72	0.37	7	0.60
Went on 1-A List	37	0.19	2	0.17
Marriage, vacation, arrest	126	0.65	9	0.77
Job length, replacement	900	4.62	48	4.11
Illiness	239	1.23	12	1.03
Indeterminate	570	2.93	40	3.43
Recalled	134	0.69	6	0.51
Injured on job	37	0.19	3	0.26
Deceased	23	0.12	0	0
Could not handle equipment	47	0.24	16	1.37
Suspended by union	84	0.43	9	0.77
Labor dispute	15	0.08	0	0
Retired	7	0.04	0	0
Other	14	0.11	1	0.09
Total	19,475	100.00	1168	100.00

It is apparent from Table 3 that the frequency distributions for white and black job termination reasons are virtually identical.[8] The predominant reason for termination for each race was lay-offs (80.28% of white terminations and 80.82% of black terminations). The remaining cases of termination are distributed in virtually the same proportions for whites and minorities. None of the reasons for termination produced a statistically significant difference by race.

[8] This is confirmed by the Smirnoff statistical test.

Companies

10. For each referral in this study, a notation was made of the company to whom the person was referred. There were 1327 firms using the District I hiring hall that got referrals during the 1969-1971 period.[9]

11. Of the 1327 employers who hired referrals from the union:

(a) 1018, or 76.7 percent, hired whites only;

(b) 35, or 2.6 percent, hired minorities only;

(c) 274, or 21.7 percent, hired both whites and minorities.

12. Of the firms which never hired minorities during the period, 15 were referred at least one minority person.

PART II

COMPANY HOURS[10]

13. For the 1969-1971 period, the union records listed 1488 employers who reported hours worked by persons belonging to or associated with Local 542. The number of firms which reported more than zero hours for each year during this period is: 1034 in 1969; 1061 in 1970; and 1035 in 1971.

14. Of the 1488 employers who reported hours over the entire period, 1036, or 69.6 percent, reported no minority hours. The percentage of active firms with no minority hours for each year is given in the following table.

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[9] This does not include C and D branch members, who are hired directly by the employers. See footnote 1.

[10] This data includes all Districts of the union.

TABLE 4

Active Firms with No Minority Hours

Year	No. Active Firms	Active Firms With No Minority Hours	Percent
1969	1034	773	74.8
1970	1061	762	71.8
1971	1035	757	73.1

The percentage of firms reporting no minority hours was thus relatively constant for the period.

15. The percentage of total hours worked by race for each year during this period is given in the following table.

TABLE 5

Employer Hours Worked by Race

Year	Percent Reported Hours White	Percent Reported Hours Minority
1969	96.42	3.58
1970	96.30	3.70
1971	96.38	3.62

16. Counsel for the plaintiffs asked me to examine the racial distribution of hours worked in paving, because they believe that this is the lowest paying job. For this purpose, counsel supplied me with a list of the 20 companies which have the word "paving" or "asphalt" in their names, and which counsel therefore assume do substantially paving work.[11] The results for these 20 companies are given in the following table.

[11] These twenty companies are listed in the Appendix.

TABLE 6

Hours Worked in
"Paving" Companies

Year	Number Hours	Percent Minority Hours
1969	355,630	9.71
1970	339,289	10.77
1971	291,610	11.99
Total	986,529	10.74

The percentage of hours worked by minorities in the "paving" companies is far in excess of the percentage of minority hours overall (Table 5).

17. Counsel for the plaintiffs also requested that I supply a list of major minority employers of operating engineers. The following firms reported at least 10 percent of their total hours as minority *and* hired in excess of 10,000 minority hours over the 1969-1971 period.

TABLE 7

Major Minority Employers

Armour Rental, Inc.
Barger Construction, Inc.
Beaner Brickwork, Inc.
Bodine Construction Co.
Butera Enterprises, Inc.
Corrado Brothers
Dimarco Brothers
Durkin Construction Co.
Eastern Asphalt Co.
Elser-Diviney & Co.
Keystone Equipment Co.
Hyman-Korman, Inc.
Landsdowne Construction
Miller & Son Paving
Morrello R.W.

Thomas A. Ridley Co.
Rockland Construction Co.
James J. Skelly, Inc.
Tri-County Construction
Trinity Paving
Union Paving Co.
Warner Corp.
Wright Concrete Co.

The data with respect to referrals and hours worked for these firms indicates strongly that the referral system operates in a manner which clusters minority operating engineers in an extremely small segment of employers:

(a) The 23 firms listed in Table 7 received 7.43 percent of all District I referrals for 1969-1971. However, they received 17.17% of all District I minority referrals for that period (i.e., 206 minority referrals).

(b) These 23 firms reported 5.96% of the total hours worked by operating engineers in 1969-1971. However, these 23 firms reported a total of 369,083 hours worked by minorities. This represents 32.41 percent of all hours worked by minorities.

(c) In other words, we have 23 firms which account for less than 1 out of 13 hours worked and District I referrals overall; but they account for about 1 out of 3 minority hours and 1 out of 6 minority referrals.

(d) To put the comparison in another way, as noted earlier, less than 6% of District I referrals went to minorities, and less than 4% of all hours worked were by minorities; yet 13.00% of the persons referred from District I to these firms were minorities, and 21.47% of the hours reported by these firms were worked by minorities.

APPENDIX

"Paving" Companies

Addy Asphalt Co.
American Asphalt Co.
American Paving Co.
Asphalt Paving Co.
East Penn Paving Const.
Evans Asphalt Co.
Gen. Asphalt Paving
Lock-Hollman Paving Const.
M & M Paving
Miller & Son Paving
Penn Paving
Rhoad Paving & Cont.
Slaw Landis Paving
Smith Asphalt Paving
State Paving & Constr.
Trinity Paving Co.
Union Paving Co.
Union Blacktop Paving
Upland Paving
Warren Paving

Appendix

Employee: _____

SS: _____

Race: _____

Job Refusals

Employer	Year	Reason

Job Record

Employer	Initiation	Termination	Reason for Termination	Recall/ Reprimand

EXCERPTS OF TRIAL TRANSCRIPT

[Trial transcript, pp. 328-330]

[Witness B. R. Siskin]

[328] A This is found in Table 1.

Q At what page?

A Page 6.

Q And briefly what did you find?

A Briefly we found that 6.5 percent of the work records we were dealing with were of minorities. They received 5.5 percent of the referrals. So, they were getting less than their share of referrals.

Q Was the difference statistically significant?

A Yes, it is.

MR. FREEDMAN:[*] If the Court please, I object to that last conclusion and move it be stricken because that is a conclusion which a statistician cannot make under the figures here. That is for a labor economist.

THE COURT: Objection overruled.

BY MR. REINSTEIN: [**]

Q O.K. Now, having found these 22,000 or 23,000 referrals, what did you then do?

A The next thing I looked up at was to determine the percent by race which resulted in employment. This is presented in Table 2.

Q On what page?

A Page 7, and what you find is two things really. You find that only a small percent of referrals do not result in employment. 93 percent roughly of all referrals noted wound [329] up in employment for the person, and when you looked at it by race there was no difference. Basically it is the same, the success rates are the same by race.

Q The category which would be called unsuccessful referral, would this include unsuccessful attempts by the hiring agent to locate the person?

A If it was noted on the record, yes.

[* Counsel for Local 542.]

[** Counsel for individually named and class plaintiffs.]

Q Would it include a job refusal?

A If noted on the work record, yes.

Q Would it include a refusal by the company to hire?

A If noted on the work record.

Q Under the collective bargaining agreement then in effect do you know who has the control or decision to hire someone referred?

A It states it is in the hands of the employer.

Q Suppose the person accepted the referral but couldn't reach the job because, for example, the person didn't have an automobile or was unavailable for another reason. Would that be included?

A If it was noted in the work record, yes.

Q In the referrals here did you include recalls, by the way, in this analysis?

A I did not include what we call recalls. We could not really tell whether it was a recall or not. In some cases it was noted. In a lot of cases it wasn't clear. It wasn't [330] noted, but a person would have been sent to the same employer within 90 days. What we did, we classified as a recall any situation where the person was referred back to the same employer he had worked for within the last 90 days, and they were eliminated from this analysis.

Q Why did you eliminate them from this analysis?

A Recalls would be a special situation. Obviously they are going to result in employment because the person had been specifically asked for.

Q Did you also look besides referrals and unsuccessful, did you look at the reasons for job terminations?

A Yes, I did.

Q Where are the results of that?

A The results of that are presented in Table 3.

Q What page is that?

A Page 8.

Q And briefly what did you find?

A Briefly, we find that the reason assigned for termination in 80 percent of the cases both blacks and whites was layoff, that if you looked at the reasons,

all the other reasons overall by race given, you find that they are basically very similar. None of the differences are statistically significant when looked at individually. If you group them as I did into two categories, those which would be employer neutral type things such as layoff, strike, labor dispute, and those which are

[Trial transcript, p. 4409]

(Witness R. Walsh]

* * * *

[4409] the job and teach you and tell you how to operate?

A I helped myself by staying and learning on my own.

Q I don't mind your explanation on it, but you have not been responsive to my question.

MR. FREEDMAN: He answered the question.

BY MR. GOODMAN: [*]

Q You in turn helped other people?

A Yes.

Q In fact, you helped pretty much and taught Bobby Heenan, your brother-in-law; isn't that right?

A That is not right.

Q Who did you teach?

A Thomas.

Q Thomas Heenan.

And this was a common practice for operating engineers to help their oilers, their fireman on the job; is that right?

A It is their job when you have an apprentice with to teach him something. If an engineer has an apprentice with him, he is supposed to teach him something, whatever he knows.

Q So the method in those days was on-the-job training?

A It still is today.

Q It still is?

A It is part of their training.

Q The normal Apprenticeship Program didn't come into * * * * * * * *

[* Counsel for individually named and class plaintiffs.]

[Trial transcript, pp. 5033-34, 5042]

[Witness B. R. Stalvey, Jr.]

[5033] I make.

Proceed.

MR. GOODMAN: The first one will be P-462.

The second, the log for November 8, '67 through November 26, 1968 will be P-463.

The next one, the log covering the period December 2, 1968 to December 18, 1969 will be P-464.

Finally, the logs covering the period January 5, 1970 to August 19, 1970 will be P-465.

(Logs for periods indicated were marked Plaintiffs' Exhibits P-462, P-463, P-464 and P-465 for identification.)

DIRECT EXAMINATION

BY MR. GOODMAN:

Q Mr. Stalvey, by whom are you employed?

A The U. S. Department of Labor.

Q What particular agency of the Department of Labor?

A The Office of Federal Contract Compliance.

Q What is your job title?

A My title is Assistant Regional Administrator.

Q How long have you been employed with the Office of Federal Contract Compliance?

A A little over ten years.

Q Has there been—where have you been stationed during that ten-year period?

A Most of the time here in Philadelphia.

• • • •

[5042] erally?

A Well, the present Philadelphia Plan called the Revised Philadelphia Plan is imposed in five counties, five Pennsylvania counties, Philadelphia, Bucks, Chester, Delaware and Montgomery. It requires the contractor to select a goal and to make every good-faith effort to achieve that goal.

Q Is that goal in terms of hours worked by minorities?

A Yes, out of the total hours to be worked in the craft he makes a commitment of a goal for minority man hours.

Q Does the Philadelphia Plan apply to all construction crafts?

A No.

Q Does it apply to the Operating Engineers craft?

A No.

Q Who developed the idea of the Philadelphia Plan?

A I did.

Q You say you came to Philadelphia in July of 1966 to work with the Office of Federal Contract Compliance; is that right?

A That's right.

Q What was your job title at that time?

A Area Coordinator.

Q Were you the first such at that time?

A The first full-time one, yes.

Q Did you develop a plan of action when you started your

• • • •

[Trial transcript, pp. 5055-5064, 5066-5072]

[Witness B. R. Stalvey, Jr.]

[5055] Please proceed.

BY MR. GOODMAN:

Q Given the fact that this was a federal job, did you make any statements to the union officials present about what the executive order required with regard to the McCloskey job?

A Yes.

Q What did you say?

A I told them that the requirement was for minority representation.

Q Were you satisfied, or did you indicate a dissatisfaction with the figures you were given?

A Yes.

Q Which did you do?

A Oh, dissatisfaction.

Q One last thing about this meeting.

Did you discover whether at the time of the meeting there was a high unemployment rate of operating engineers, or whether there was steady employment at that point?

A Steady employment.

Q Were you told how many people were out of work at that time?

A Yes.

Q What were you told?

A I was told there were very few on the bench.

Q By the way, did you learn at that meeting anything about [5056] the contract the union had with the various contractors' associations?

A Yes. We asked questions about that.

Q What did you find out?

A Well, among other things that the contractor could recall an employee within 90 days.

Q Did you find out anything about whether contractors can hire people directly?

A Yes.

Q What did you find out?

A I was told if the union doesn't supply them they can hire directly.

Q Were you told whether that happened a lot?

A I was told that that seldom happened, that the union supplied the requirements in most cases.

Q Mr. Stalvey, could you please tell me whether or not in addition to your meeting with the officials of the union you had any meetings with any of the defendants to this lawsuit, contractor associations?

A Yes.

Q Did you have any meetings with the—any representatives of the contractors association of Eastern Pennsylvania?

A Yes.

Q When?

[5057] A The meeting was in December of 1966, December 21.

Q Did you have any—who set up the meeting?

A I did.

Q Did you have any difficulties in arranging it?

A Yes. I tried to set it up for several weeks.

Q With whom?

A With Howard Minckler.

Q Why weren't you able to set it up?

A I couldn't get him, or he didn't return my calls, or he otherwise could not agree to the meeting. I have forgotten reasons.

Q The meeting you say took place on December 21, 1966?

A Yes.

Q Where was it held?

A In his office.

Q Who was present?

A He was present and Mr. Antonucci was present.

Q Just for the record, I don't know if you identified his title. Who is Howard Minckler and Mr. Antonucci?

A Minckler is the Executive Director, and Antonucci was his assistant.

Q Again would you describe what the purpose was in your setting up this meeting.

A To advise him of the responsibility of my office and responsibility of the industry and the contractors that he [5058] represented.

Q Did you explain to them what Executive Order 11246 was all about?

A Yes.

Q Mr. Stalvey, did you have any discussions with Mr. Minckler and Mr. Antonucci at that time concerning the operating engineers?

A Yes.

Q Did you try to elicit any information from either of those two gentlemen concerning the total size and the non-white size of the members in Local 542?

A Yes.

Q What were you told, and by whom?

A Well, Mr. Minckler I was told the information was pretty much what I already heard from the union.

Q Did his figures vary in any respect from—

A Slightly. He gave me a slightly larger total membership figure.

Q You had been told it was 5000?

A By the union, and he told me about 5500.

Q And the non-white figure you were told by the union was 800 to 900. What did he say?

A He said very large, and in effect I felt confirmed the figure I heard.

Q Now, had you advised him at the meeting that you found out [5059] at the meeting with these union officials what the non-white size was of the union, or did he tell you the information?

A I had to ask him, and then before the conference was over I told him, yes.

Q And he confirmed it; is that correct?

A Yes.

Q Now, with regard to the Executive Order, were you asked any questions about how that affected the contractors who were members of CAEP, if he had exclusive hiring hall agreements?

A In effect, the question was asked.

Q By whom?

A By Mr. Minckler.

Q What did you tell him?

A Well, I told him it was the contractors' responsibility regardless of the union's requirements.

Q Mr. Stalvey, given these two meetings that you had, one with the union and one with the representatives at CAEP, did you form an opinion as to the accuracy of the non-white count that you had been given at the union meeting and at the meeting with the officials of CAEP?

MR. FREEDMAN: Can I have that question back, please?

(The last question was read by the reporter.)

MR. FREEDMAN: Objection, Your Honor.

[5060] MR. McALEESE: [*] Objection.

THE COURT: Objection overruled.

BY MR. GOODMAN:

Q Did you form such an opinion?

A Yes.

Q What was it?

A I was skeptical.

MR. FREEDMAN: Objection, Your Honor.

MR. McALEESE: Objection to the second question.

THE COURT: Overruled.

BY MR. GOODMAN:

Q Why?

A. Because it didn't jibe with the general information that I had.

Q From what sources had you been obtaining general information?

A I did a great deal of reading, and I also consulted regularly with sources such as the Philadelphia Commission On Human Relations and the Pennsylvania Human Relations.

THE COURT: I think we are really getting a bit tangential at this point. If he was skeptical, it seems to me we have to proceed. We are not trying secondary sources of information.

[* Counsel for defendant associations, JATC, and Glasgow, Inc.]

BY MR. GOODMAN:

Q Did you find out whether or not the contractors' association [5061] of Eastern Pennsylvania had any kind of community agitation or recruitment programs that would affect the minority community?

A Yes.

Q What did you discover—by the way, just for the record, did you obtain this information at your meeting with Mr. Minckler?

A Yes.

Q What did you discover?

A That they had no community education program.

Q Did they indicate they anticipated having such a program?

MR. McALEESE: Your Honor, I am going to interpose an objection at this point. This lawsuit is not about 11246. It is a Title 7 case. The question is not whether contractors did or did not engage in affirmative action, and all of these questions are directed at that. It is using up a great deal of Your Honor's time and everyone else's by proceeding far afield of the issues in this case.

MR. GOODMAN: It is directly relevant to whether the Contractors' Association provided misinformation on which the Government acted. It has everything to do with this lawsuit as to whether the contractors had an adequate recruitment campaign for minorities.

THE COURT: The objection is overruled. I am permitting it for whatever probative value.

Please proceed.

[5062] BY MR. GOODMAN:

Q I think my pending question was did Mr. Minckler indicate any anticipation of having such recruitment or educational campaign?

A No.

Q Now with regard to the defendants to this lawsuit, General Building Contractors Association, did you arrange any meetings with officials of that organization?

A Yes, sir.

Q Did you have any meeting with them?

A Yes.

Q Do you remember when that was?

A I think the first one was in October, October 13.

Q What year?

A 1966.

Q With whom did you meet?

A I met with all the top officials. Harry Taylor was the Executive Director. Bill List was the Educational Director. Joe Washfield and Mr. Walker.

Q What was the purpose of that meeting?

A Again to inform them of the responsibility of my office and the responsibility that they had as federal contractors.

Q Did you in fact do that?

A Yes.

[5063] Q Did you learn any information at that particular meeting concerning the existence of any exclusive hiring hall arrangements with Local 542 of the operating engineers?

A Yes.

Q And were any questions raised by any of the people from the association as to the fact that they had to rely on that contract with Local 542?

MR. McALEESE: Objection, Your Honor. He is leading this witness. He has been leading since we started and I haven't raised any objections about it.

THE COURT: Do you want to rephrase the question?

BY MR. GOODMAN:

Q What was the nature of that discussion as it related to Local 542?

A Well, among the questions asked were how tight were the hiring arrangements, was it a definite hiring hall.

Q What did you find out?

A That there was a definite hiring hall arrangement.

Q Did you indicate anything how the executive order interplayed at all with the hiring hall?

A That regardless of such arrangement the contractors would have to meet our requirements if it meant revision of collective bargaining agreement.

Q There are two other contractor association defendants [5064] to this lawsuit. The first is United Contractors Association. Did you attempt to schedule any meetings with that organization?

A I tried several times.

Q Were you successful?

A No.

Q Why not?

A I could never locate them. I could never find out who the principals were.

Q And the last defendant as far as the associations go, Pennsylvania Excavating Contractors Association. Did you attempt to meet with representatives of that organization?

A Yes.

Q Were you successful?

A No.

Q Now, Mr. Stalvey, during the initial year that you began working for OFCC here in Philadelphia did you ascertain any information about the operating engineers from sources other than those you have already identified in court here today?

A Yes.

Q From whom?

A Well, the Commission On Human Relations.

Q Which one?

A Both the city and the state.

Q Were any complaints made to you from either of those * * *

* * * *

[5066] BY MR. GOODMAN:

Q Were the operating engineers as an industry, as a craft, originally part of the first original Philadelphia Plan?

A Yes.

Q Were you involved personally in making any recommendations with regard to inclusion of the operating engineers?

A Yes.

Q Did you make such recommendations?

A Yes.

Q I hand you a document we have pre-marked Plaintiffs' Exhibit 36, P-36. Can you identify that, please?

A Yes. This is the original Philadelphia Plan.

Q When is it dated?

A October 27, 1967.

Q When did it go into effect?

A 30 days—November 30, 1967.

Q At that time, the time that it was issued, what were the crafts, the construction crafts that were included in the Philadelphia Plan?

A There were eight. The operating engineers were one, the roofers were another. Then the six crafts we now have in the present plan. They were electricians, elevator constructors, sheetmetal, plumbers, steamfitters and ironworkers.

Q Was there any information contained in this document [5067] P-36 concerning operating engineers, Local 542?

A Yes.

Q Please turn to page 15. With regard to—

MR. FREEDMAN: Wait a minute, please.

Go ahead.

BY MR. GOODMAN:

Q In particular, I draw your attention to the bottom paragraph. Is that the page and continuing on to page 16 that you were making reference to?

A Yes.

Q Now I draw your attention to the first sentence. It says "While some union sources have indicated the minority membership is as high as 800 or 900, there

have been indications from some contractors that only a few of these are in the top journeyman classification."

Can you tell us, please, what contractors are being referred to in that sentence?

A One of them was McCloskey.

Q Did you speak with anyone at the McCloskey Company?

A Yes.

Q Who?

A I spoke to the top official at that time, James McCloskey.

Q Anyone else?

A And Tim Dineen.

[5068] Q Who is Mr. Dineen?

A I have forgotten his title, one of the top officials under Mr. McCloskey.

Q Did either one of them or both provide you with the information contained in the sentence I have just read?

A Yes, Tim Dineen did.

Q Did either one of them give you any indication as to what they felt about the non-white membership of Local 542?

A Well, they were skeptical about the kind of numbers that I quoted to them and the classification. They were skeptical if the minority workers, whatever the number were, in the top categories.

Q The sentence that follows that one there is an indication that there have been two complaints lodged against the union. Could you identify, if you can, who made those complaints?

A Yes, the organization C.O.R.E., the Director Bill Mathews of C.O.R.E. was one of them, and then a Mrs. Richard Howard.

Q What was her complaint?

A She was calling on behalf of her husband who is a black operating engineer.

Q Let's go back to C.O.R.E. Had you been in touch with anyone from that organization prior to the issuance of the plan?

A Yes.

Q Did that have to do with any allegations concerning the [5069] operating engineers?

A Not originally. It was simply in the course of contacting all organizations to determine availability and possible recruitment help, but later on it was, yes.

Q Later on there were such allegations?

A Yes.

Q By whom were they made?

A By Bill Mathews, the Director.

Q Did he specify the nature of the complaints his organization had?

MR. FREEDMAN: If the Court please, I haven't objected to the leading questions, but they are absolutely atrocious.

THE COURT: Sustained as to Mr. Mathews. It seems to me, Mr. Goodman, that at this point having been on trial since January I guess the issue is going to be whether the 800 or 900 purportedly given to him was an accurate statement. We had Mr. Ciavaglia on the stand for weeks. We had Mr. Walsh on the stand for weeks. If you want to retry each component part of the case, on which my memory is so keen, I will grant it.

MR. GOODMAN: All right. Let's move to another area then.

BY MR. GOODMAN:

Q With regard to the Philadelphia Plan itself, the one that [5070] you have in front of you, was that plan in any way rescinded or withdrawn?

A Yes.

Q When?

A Well, in the period following November 18, 1968.

Q What happened then?

A On that day the Comptroller General issued an adverse opinion about the legality of the plan.

Q Was the Philadelphia Plan revised and reissued?

A Yes.

Q When?

A The following June of 1969.

Q I hand you a document which we pre-marked Plaintiffs' Exhibit 37. Can you identify it?

A Yes.

Q What is that?

A The memorandum to the heads of all agencies from the Assistant Secretary, Arthur Fletcher, which issued the first part of the Philadelphia Plan.

Q In that document were the operating engineers as a craft included at that time?

A Yes. Oh, no. Not at this time, no.

Q They had been eliminated; is that correct?

A That's right.

Q Was the Philadelphia Plan amended after that revision?

[5071] A Yes.

Q I hand you Plaintiffs' Exhibit P-38. Can you identify that?

A Yes.

Q What is it?

A It was an order to the heads of all agencies dated September 23, 1969 which issued the arrangements necessary to implement the plan.

Q Were the operating engineers included as a craft to be covered by that revision?

A No.

Q Were there subsequent amendments to the Philadelphia Plan?

A Yes.

Q I hand you P-39. Can you identify it?

A Yes.

Q What is it?

A It is an order to the heads of all agencies from the Assistant Secretary and the Secretary of Labor amending the plan to include the private work of federal contractors.

Q Were the operating engineers as a craft covered at the time of this amendment?

A No.

Q Now go back to the issuance of the initial Philadelphia Plan, was it immediately, that is to say it was issued in November of 1967; is that right?

A Issued in October, 1967.

[5072] Q Did it immediately take effect?

MR. FREEDMAN: If the Court please, in view of the fact that the initial plan was declared illegal by the Department of Justice and thereafter the operating engineers played no part in the operation of the Philadelphia Plan I object to this question and all other questions which have anything to do with the Philadelphia Plan.

THE COURT: Objection overruled.

BY MR. GOODMAN:

Q Now go back to the plan, did it go initially and immediately into effect?

A Approximately 30 days after it was issued.

Q Now would you describe the period immediately following that in terms of the letting of contracts.

A There was a lull—

MR. McALEESE: Your Honor, I object. It seems to me that if Mr. Stalvey is going to testify about a subject matter of that sort then it seems to me that it is entirely appropriate, absolutely necessary as a matter of law that he establish first that he has the sufficient competency, first-hand knowledge to give testimony about any events now that he wishes to go forward with. That certainly is a requirement of the rules of evidence, and

he just can't sit up there and speak about generalities about a lot of events without first establishing that he has first-hand knowledge.

* * *

[Trial transcript, pp. 5088-5100]

[Witness B. R. Stalvey, Jr.]

[5088] AFTERNOON SESSION

Present: Counsel as before noted.

THE COURT: Please proceed.

BENNETT L. STALVEY, JR., resumed.

DIRECT EXAMINATION

(Continued)

BY MR. GOODMAN:

Q Mr. Stalvey, before lunch you had testified that when the Philadelphia Plan was reissued the Operating Engineers as a craft were not part of it; is that right?

A That's right.

Q Why not?

A Because they had developed—

MR. McALESSE: Objection, Your Honor.

THE COURT: Let me hear the answer.

THE WITNESS: Because they had developed an areawide affirmative action plan.

MR. McALEESE: Your Honor, I don't think it had been demonstrated on this record that Mr. Stalvey has a basis to reach a conclusion of that sort. The Philadelphia Plan was issued out of an office in Washington, the revised [5089] Philadelphia Plan.

THE COURT: An office which he was a part of.

Objection overruled.

MR. FREEDMAN: And he did not have, Your Honor, jurisdiction to determine whether or not they should be included within the plan.

MR. GOODMAN: Your Honor, all I asked was whether or not the Operating Engineers were part of the Philadelphia Plan as revised. He said no. I asked why not. He answered the question. I think—

MR. FREEDMAN: And he—

THE COURT: Let me hear Mr. Goodman.

MR. GOODMAN: I think if I be permitted to continue this line all of the defendants' comments would be answered, or they could deal with it on cross-examination. I think it is inappropriate—

MR. FREEDMAN: We have to do it the way we think is correct.

THE COURT: I made by ruling. Proceed.

MR. FREEDMAN: He wouldn't know why or why not. He didn't have anything to do with it.

THE COURT: I made my ruling. Please proceed.

BY MR. GOODMAN:

Q Mr. Stalvey, I have handed you a document pre-marked Plaintiffs' Exhibit No. 7. Would you examine it and then identify [5090] it, please.

A This is a copy of the areawide affirmative action program developed by the union and the contractors.

Q Now, Mr. Stalvey, can you tell me whether or not there are any press releases issued by your office regarding this affirmative action plan?

A Yes, there were.

Q Directly out of your office in Philadelphia?

A Yes, one of them was.

Q I hand you a document pre-marked Plaintiff's Exhibit 27. Can you please identify that?

A This is the release which I prepared and released out of my office.

Q Was there in addition a release out of the Washington office of OFCC?

A Yes.

Q I hand you a document pre-marked as Plaintiff's Exhibit 28. Can you identify that, please?

A This is the release dated July 29 by our national office, Department of Labor.

Q Now, Mr. Stalvey, can you identify who Ward McCready is?

A He was the Acting Director of the Office of Federal Contract Compliance at that time.

Q Did Mr. McCreedy issue any memorandum concerning this [5091] affirmative action program to your knowledge?

A Yes, he did.

Q I have handed you Plaintiff's Exhibit P-15. Can you identify that, please?

A This is a memorandum dated July 22, 1968 to the heads of all agencies from Ward McCreedy about an affirmative action program.

Q Those are the federal agencies?

A Yes.

Q Do you know whether Mr. McCreedy issued any follow-up memorandum?

A Yes, he did.

Q I hand you P-16. Can you identify that?

A It is a memorandum dated August 26, 1968 to the heads of all agencies from Ward McCreedy concerning the program and the fact that the Contractors Association have—

MR. FREEDMAN: If the Court please, I move that the witness not be permitted to paraphrase the document. The document speaks for itself.

THE COURT: I will permit him to summarize it. If he doesn't do it accurately I am certain you will call it to my attention.

BY MR. GOODMAN:

Q Will you please identify P-16, the second memorandum of Mr. McCreedy.

[5092] A This is the one to the heads of all agencies dated August 26, 1968 about the affirmative action plan and that the Contractors Association of Wyoming Valley had become signatories to it.

Q The Contractors Association of Wyoming Valley were not a signatory to the document that I handed you, P-7?

A That's right, they were not.

Q Did Mr. McCreedy issue any further memoranda?

A Yes.

Q I have handed you Plaintiff's Exhibit P-143. Can you identify that document, please?

A It is a memorandum dated October 9, 1968 to the heads of all agencies from Ward McCreedy concerning the affirmative action program and that the General Building Contractors Association had become signatory.

Q They were not a signatory at first, at least to the document I have handed you that has been identified as P-7; is that correct?

A That is correct.

Q Now, with regard to each of the McCreedy memos, namely, P-15, P-16 and P-143, would you point out the language in which it is indicated that participation by a contractor who is part of the affirmative action progam would be in lieu of any other requirement under federal law?

MR. McALEESE: Objection, Your Honor. This [5093] document is not in evidence in this record. This document has only been identified.

MR. GOODMAN: It certainly is true we haven't moved it in evidence. I asked him merely to point out the relevant language in the document.

MR. McALEESE: It is irrelevant to point out anything in a document until we find out if it is an admissible document.

THE COURT: Is this from your office of Federal Contract Compliance?

THE WITNESS: Yes.

THE COURT: I will rule it is a relevant document. Please proceed.

MR. McALEESE: Your Honor, certainly over our objection.

THE COURT: You have an objection and an exception to all of my rulings.

BY MR. GOODMAN:

Q Will you point out the relevant paragraph?

A The second paragraph.

Q Is that true of all three of the McCreedy memos?

A Yes, it is.

MR. FREEDMAN: Is that on 143?

THE WITNESS: That's one of the three, yes.

MR. FREEDMAN: I asked you whether you were [5094] referring to document P-143.

MR. GOODMAN: Don't answer that question. I am asking the questions right now.

MR. FREEDMAN: Wait a minute.

THE COURT: I presume he is referring to P-143.

MR. FREEDMAN: That's what I asked him.

MR. GOODMAN: My question, Your Honor, so the record is clear, that second paragraph is in each one of McCreedy's memos, P-15, P-16 and P-143.

BY MR. GOODMAN:

Q Is that correct?

A That is correct.

Q Now, in addition to being removed from the coverage of the Philadelphia Plan, that is the Operating Engineers, was there any other effect that the affirmative action program had?

A Yes, it released the funds that had been withheld.

Q Now, the affirmative action program if I remember right is dated July 17, 1968?

A That's right.

Q At that point were you getting records from the federal agencies as to the amount of construction, building construction, in the five-county area?

A Yes.

Q What was the amount of money on or about July 17, 1968 that had been withheld?

[5095] A From all agencies it was over $100 million.

MR. McALEESE: Your Honor, I object to this testimony again. I hate to keep standing here and objecting, but I think the testimony is out of line. He is testifying here, making testimony or assertions about records that he says that he has available to him. Now, his testimony is not based upon his own first-hand knowledge, and if it is based upon documents, where are the documents? He is asserting facts into this record and making a record which is totally inappropriate and an improper record.

MR. GOODMAN: Your Honor, it seems to me that this witness testified from the source that he consulted in order to answer the question. If the defendants are not satisfied with the response and want to see any other documents, they have the means available to do that, but it seems to me that is a matter that is more appropriately reserved for cross-examination than an objection at this point.

MR. McALEESE: Certainly not.

THE COURT: I have made my ruling. I am going to permit it. You have an exception.

BY MR. GOODMAN:

Q Do you still have the affirmative action program in front of you, Mr. Stalvey?

A Yes.

Q Take a look at the first page, please, the third numbered [5096] paragraph.

THE COURT: Which exhibit?

MR. GOODMAN: P-7, Your Honor.

BY MR. GOODMAN:

Q Have you had an opportunity to read that full paragraph?

A Yes.

Q There is, as you can see, an assertion of a detailed analysis of the employment of minority group workers that is alluded to in that paragraph.

Can you tell me whether any such detailed analysis was ever presented to you or your office?

MR. McALEESE: Your Honor, I am going to object. This is not in the record, either.

THE COURT: Objection overruled.

THE WITNESS: It was never presented to me, no.

BY MR. GOODMAN:

Q Mr. Stalvey, the result of that detailed analysis as purported in Paragraph 3 is that there were approximately 650 members of Local 542 out of a total membership of 5400. Was that minority group figure ever presented to you?

MR. FREEDMAN: If the Court please, there was never any obligation to present it to him.

THE COURT: There is no statement there is an obligation. The question is whether he ever received it.

[5097] THE WITNESS: No, I never received it.

MR. FREEDMAN: But the clear implication is there is an obligation that was supposed to be put to his majesty here, and he never got it.

THE COURT: That's not the implication I got.

BY MR. GOODMAN:

Q Were reports supposed to be submitted to you in your office, Mr. Stalvey?

MR. FREEDMAN: Objection, Your Honor.

MR. McALEESE: By whom?

MR. GOODMAN: Your Honor, I think I have a right to pose a question and follow it up as I see fit.

MR. McALEESE: A proper question.

THE COURT: Wait a minute. I think the last question should be amended.

MR. GOODMAN: Surely, and I will do it.

BY MR. GOODMAN:

Q Do the parties to this agreement, the ones who signed it, have an obligation to submit reports to your office?

A Yes.

Q Turn to page 4. Point out the paragraph or passages from that page which indicate that.

A The first sentence of the first paragraph on page 4, and the second sentence.

MR. FREEDMAN: What did you say?

[5098] BY MR. GOODMAN:

Q Mr. Freedman didn't hear you.

A The first and second sentence of the paragraph on page 4 describes the reporting requirements.

Q Is there anything in there with regard to the reports noting the number of minorities in the union?

A Yes, the second sentence.

Q Now, if the figure 650 were in fact inaccurate, would you personally have recommended approval of the affirmative action program?

A If they were inaccurate I would not have recommended approval.

Q If in fact there were no detailed analysis would you have recommended approval?

A No.

Q Subsequent to the execution of the affirmative action program did you make an attempt to ascertain the numbers of minorities in Local 542?

A Yes.

Q Did you have any meetings?

A Yes.

Q With whom?

A With officials of the union.

Q Who?

A Walsh, Dawson, O'Donoghue, and an attorney by the name [5099] of Martin Vigderman.

Q Do you recall when you met with them?

A That meeting was February of 1970—I am sorry, '69, February 18.

Q Where was that meeting held?

A In their office, the union office.

Q In Philadelphia?

A Yes.

Q Were you given any figures at that point as to the number of minorities in Local 542?

A Yes.

Q What figure were you given at that time?

A 400.

Q Now, did you receive any correspondence from Mr. Vigderman prior to that meeting?

A Yes.

Q Did you ask him to write, or did he do it on his own?

A Well, I asked him for information. I believe I did ask him to write, yes.

Q What kind of information did you ask him for?

A I asked him for data on union membership.

Q I hand you a document which we have pre-marked as Plaintiff's Exhibit 30. Would you be good enough to identify that for me?

A That's a letter dated January 8, 1969 to me from Martin [5100] Vigderman.

Q Now referring to that document, to that letter, would you be good enough to refer to it and advise the Court as to the total members and the number of minorities identified in that letter by Mr. Vigderman?

A Mr. Vigderman's letter says there were 5500 members and there were 350 minority.

Q Did he indicate this was an approximation, a guess, or whether that was a hard figure?

A Yes, he cautioned that this was a guess.

THE COURT: I have read through the letter.

MR. GOODMAN: Sure. I only want to ask one other thing.

BY MR. GOODMAN:

Q In the last paragraph of—beginning on page 1, Mr. Stalvey, and the paragraph that begins on page 2, there is a reference to a training program in Resica Falls in which he states that a recent group of 100 hard core unemployed men were sent upstate there, and goes on to assert that most of these men were Negroes. Do you know what he is referring to there?

A What became known as Project Ben Franklin.

Q Was Project Ben Franklin or Operation Ben Franklin part of the affirmative action agreement?

* * * *

[Trial transcript, pp. 5137-38]

[Witness B. L. Stalvey, Jr.]

[5137] MR. FREEDMAN: Objection, Your Honor.

THE COURT: Objection overruled.

THE WITNESS: Yes.

BY MR. GOODMAN:

Q Was this document a part of your operating engineers' file?

A Yes.

Q Mr. Stalvey, have you had occasion to supply to any of the defendant associations in this case a list of recruitment sources available to them for consulting for the availability of minorities to work as operating engineers?

A Yes.

Q What associations have you made such a list available to?

A Among others the Contractors Association of Eastern Pennsylvania.

Q I have handed you two documents, first Plaintiff's Exhibit P-206 and then Plaintiff's Exhibit P-41. Please examine P-206 first and then, if you would, would you identify it.

A P-206 is a letter dated December 15, 1970 to Howard Minckler from me. Attached to it is a—several lists of resources which contractors are referred to.

Q For what purpose?

A For recruitment.

Q Did any of the sources identified there involve operating engineers or people who could recommend operating engineers?

[5138] A They had that potential, yes.

Q I hand you a second document, P-41. Can you identify that, please?

A P-41 is a document dated July 28, 1972, and it is entitled "Community Referral Source List."

Q Was it ever delivered to any of the contractor associations?

A Yes.

Q To whom?

A My recollection is to all of them.

Q Did the sources identity on that document include those who could recommend minority operating engineers?

A Yes.

Q Now, Mr. Stalvey, can you identify who Al Blumrosen is?

A Al Blumrosen is a consultant to the Department of Labor, the national office.

MR. FREEDMAN: Referred to in what document?

MR. GOODMAN: That is coming up, but if you would like to know in advance, it is P-14 and P-144.

BY MR. GOODMAN:

Q Now, did Mr. Blumrosen provide any services that you are aware of for the office of Federal Contract Compliance with regard to the operating engineers' affirmative action program?

A Yes.

Q What services did he provide?

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[Trial transcript, p. 5141]

[Witness B. L. Stalvey, Jr.]

[5141] BY MR. GOODMAN:

Q Is the affirmative action plan of the operating engineers in effect today?

A Yes.

Q And has it been in effect since its execution on July 16, 1968?

A Yes.

Q Have the operating engineers or the parties to the agreement submitted semi-annual reports to you as required by the plan?

A No.

Q When was it, so far as you can recollect it, the last report was submitted to you or to your office?

A In 1969.

Q Mr. Stalvey, has there been a proposed amendment to the Philadelphia Plan that would affect the operating engineers industry?

A Yes.

Q Has that been published anywhere?

A Yes.

Q Where?

A In the Federal Register.

Q When?

A July 8, 1975.

Q What does it propose to do?

* * * *

[Trial transcript, pp. 11959-60]

[Witness H. G. Minckler, of CAEP]

[11959] I think it was November of 1968.

Q Now, other than the Girard Point Bridge project, are you aware of any other state highway construction project where the federal government withheld funds from the project because the low bidder would not agree to include the original manning tables?

A No, no other projects were withheld.

Q Mr. Minckler, the collective bargaining agreement between your association and—excuse me for one second.

To the best of your knowledge, Mr. Minckler, was Peter Kiewit a member of any of the other associations, defendants herein, when they bid on the Girard Point Bridge?

A No, he was not.

Q Mr. Minckler, the collective bargaining agreement between your association and the other associations and Local 542 has a recall provision as well as a special skills provision in the agreement. Do you know the origin of that provision?

A Yes, I do.

Q What—

A In 1961 when we started negotiating with the operating engineers Local 542, one of their demands was for a hiring system. We objected to that. At the same time our negotiations were going on they were also negotiating with [11960] the Delaware Contractors Association. Prior to May 1, they reached an agreement with the Delaware Contractors Association containing the 90-day recall provision, and the special skills provision in it. As of May 1 our association still resisted the efforts of putting it in the contract, and a strike was called.

During the strike the union asked for the hiring hall as had been negotiated with the Delaware Contractors Association, but we continued to resist it. We contacted Washington, the Department of Labor and the National Labor Relations Board to try to get some help in combating the hiring system. After a 10-week strike the contractors felt that there was no avenue open to them since the only response we were getting from Washington was that the Supreme Court had upheld the placing of hiring systems in agreements. So the contractors gave in and signed the agreement.

Q So it was your understanding at that time that the existence of a hiring system in a collective bargain-

ing agreement had been upheld by the Supreme Court of the United States in 1960?

A Yes, that was the only response we got from Washington.

Q Now, does Glasgow presently have any major highway construction work in Philadelphia County?

* * * *

[Trial transcript, pp. 12033-39]

[Witness H. G. Minckler]

[12033] Q On the other side, would you identify the individuals from the union who were involved in the bargaining?

A Mr. Walsh, Mr. Dawson, Mr. Freedman, Mr. Leone.

Q You have already testified on direct examination that the contractors, the committee you were on opposed the hiring hall system as such, is that correct?

A That's correct.

Q Tell the Judge why.

A We wanted the free and unfettered right to hire who we wanted to.

Q After finding out that there was a Supreme Court decision which permitted hiring hall agreements in collective bargaining agreements, you essentially decided to agree to have a hiring hall provision with Local 542. Is that correct?

MR. McGOLDRICK: [*] Objection, Your Honor, misleading. The testimony was that they took a 10-week strike, not that they heard about the Supreme Court decision. The way the question is phrased is as if they found out about the Supreme Court decision and then caved in.

MR. GOODMAN: I will rephrase the question. I apologize.

BY MR. GOODMAN:

Q There was a 10-week strike prior to your agreeing to [12034] the hiring hall provision, is that right?

A That's correct.

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[*] Counsel for defendant associations, JATC, and Glasgow, Inc.]

Q And I take it during that time or at some point close thereto you found out about the Supreme Court decision, is that correct?

A No, we found out about the Supreme Court decision fairly early during the strike and I guess continued fighting in the hopes that the union would cave in.

Q But they didn't?

A They didn't.

Q Now, with regard to the out-of-work lists, the contractors' committee believed that was part and parcel of the hiring hall system, is that correct?

A I don't understand the question.

Q The hiring hall system essentially permitted the union to be like a referral agent, an employment agency for the contractors. Is that right?

MR. FREEDMAN: Objection.

MR. McGOLDRICK: Objection.

MR. FREEDMAN: Your Honor, it completely mischaracterizes.

THE COURT: Gentlemen, we are dealing with a very intelligent witness, graduate of the great Syracuse University, and I presume if a question is misleading in this form that he will be able to correct it.

[12035] MR. FREEDMAN: I don't care how intelligent he may be. If the question is misleading, he may not recognize it.

THE COURT: Not Mr. Minckler. Objection overruled.

THE WITNESS: Would you repeat the question, please?

BY MR. GOODMAN:

Q Insofar as the union was concerned, what the employers were essentially giving up was the right to make the decision at the outset as to who to hire, is that correct?

MR. McGOLDRICK: Objection, Your Honor, it is mischaracterizing the record.

THE COURT: Overruled. It is not a question of what the record is. It is a question in terms of what his understanding is. We are not dealing with someone unsophisticated or naive. We are dealing with someone highly competent and I am confident he will know if the record is or is not in—does or does not comport with the question.

MR. FREEDMAN: I take exception to that, Your Honor. I just don't care how intelligent he is.

THE COURT: Mr. Freedman, I made my ruling. The objection is overruled. It is irrevocable. I made my ruling and I don't want any further argument.

[12036] MR. FREEDMAN: I accept it. I wanted to say I hadn't objected before, that is why I am objecting now.

THE COURT: All right.

BY MR. GOODMAN:

Q The contractors were giving up the right to make the decision as to who to hire, is that correct?

A I don't think they were doing that. They were agreeing to hire all their employees doing operating engineer's work through the union.

Q And that agreement has continued from the 1961 contract right up and until the present time?

A That's correct.

Q Is that correct?

A That's correct.

Q Was the committee aware that in so doing they were essentially relying on Local 542 to refer to them operating engineers?

A Yes.

Q And were contractors aware so long as the man was qualified to do the job, had the skill involved, they were relinquishing the initial decision to who to hire to the union?

A Really, no. In that instance actually the union was referring a man out to them that said he could do a par-

ticular job. When he got on the job, arrived on the [12037] job and was given the work to do, if he could not do it he was not hired.

Q But in the initial instance the contractors were aware, and I take it throughout the period that you were negotiating for them, that the decision to who to refer was now being delegated to the union, is that correct?

A Yes.

MR. FREEDMAN. I object to that and I move it be stricken. The collective bargaining agreement says absolutely nothing like that.

THE COURT: Objection overruled.

BY MR. GOODMAN:

Q You testified at your deposition that the contractors insofar as you were aware were opposed even at the present time to the hiring hall system, is that correct?

A That's correct.

Q And nonetheless through its collective bargaining process the contractors have continued the hiring hall system presently embodied in the collective bargaining agreements, is that correct?

A We had another strike in 1963 over our request to remove that, plus some other issues. I think that strike was 10 or 12 weeks also.

THE COURT: In '63?

[12038] THE WITNESS: 1963, Your Honor.

BY MR. GOODMAN:

Q Despite that strike, once again the hiring hall system in the contract continued. Am I correct?

A We saw our fights were ineffectively losers.

THE COURT: Mr. Minckler, would this be a fair statement, that it was the contractors preference to not have the present hiring hall system but in terms of give and take in collective bargaining, facing a strike and the economic consequences therein, you had agreed to the hiring hall system, though if you had unilateral authority you would not have written one into the contract?

THE WITNESS: That's correct, Your Honor.

BY MR. GOODMAN:

Q You mentioned the 1963 negotiations and other issues came up. Is that what you just testified to?

A I said the hiring hall and other issues were involved.

Q One of those other issues were allegations by the contractors committee that Local 542 was discriminating against blacks, was it not?

A No.

Q Never came up and it wasn't true that as a result Mr. Holland was appointed onto the negotiating team for the 1963 negotiations?

[12039] A Al Holland participated in the 1963 negotiations on the committee but I don't know the reason why the union put him on there. We weren't privy to the union's naming the committee.

Q Mr. Minckler, is it your testimony throughout the collective bargaining agreement negotiations with which you have been involved since 1961 that the contractors have never taken a stance so far as you know that there was racial discrimination against minorities by Local 542?

A In the give and take of conversation during bargaining we used to have some pretty rough give and take's. I suppose mention could have been made one time just to stir the union up.

Many things were said that weren't necessarily positive factors.

Q Well, just so I understand your testimony, is it that when it was brought up, if it was brought up at all, it was done not because it was true but because it was a collateral issue?

A I don't know what you mean by collateral issue.

Q When you brought it up, did you mean it?

A No, it wasn't meant.

Q It was brought up but you didn't mean it. Is that your testimony?

A Yes.

* * * *

[Trial transcript, pp. 12051-54]

[Witness H. R. Minckler]

[12051] Local 342 there was included in the collective bargaining agreements a clause that required the establishment of a joint labor-management committee to compile a list on the experience and the skills of operating engineers, is that correct?

MR. FREEDMAN: Can I have that question back again? I didn't understand it.

(The pending question was read by the Court Reporter.)

MR. FREEDMAN: This is during the negotiations, Your Honor. The question is highly inconsistent.

THE COURT: If there is any objection to the question, the objection is overruled.

Can you answer it, Mr. Minckler?

THE WITNESS: No, I would have to see the clause, Your Honor. I don't commit that agreement to memory. I have been shafted too many times dealing with the union.

BY MR. GOODMAN:

Q I hand you page 6 of Plaintiffs' Exhibit 216. On page 6 there is the following clause: "There will be a joint committee consisting of three members appointed by the union and three by the employer to compile a list showing the experience and background of all eligible employees in each of the districts."

A Yes, but I think that agreement has been removed. [12052] That particular clause required the establish-

ment of a particular committee. My question to you is was that committee ever established?

A No, because the employers—

Q I didn't ask you why.

MR. FREEDMAN: Let him finish his answer.

MR. McGOLDRICK: Objection.

THE COURT: Can you answer that yes or no?

THE WITNESS: No, I couldn't, Your Honor.

THE COURT: All right. Answer it and if you have an explanation you may give it.

THE WITNESS: That committee was never formed because the employers felt that under the agreement they had the right to judge the man's ability when he showed up on a job to run the piece of equipment he was sent out to run. It was an impossibility to have a committee of six people sit down and review the six or seven thousand people in the union and say what their capabilities were. So it was never implemented.

BY MR. GOODMAN:

Q In terms of the relative skills of black operating engineers on the one hand, white operating engineers on the other, do you recollect testifying at your deposition that you believe from your experience that they were equally skilled?

[12053] A That's correct.

MR. McGOLDRICK: Objection, Your Honor. We are going back to the depositions again. The rules are clear that the use of a deposition of a party on the stand can only come into play when there is impeachment of credibility. We have no such impeachment of credibility here. If he asked him a question and he answered it differently, he can confront him to impeach his credibiilty. What we are doing is putting the deposition into the record clearly in a means not provided for under the rules.

THE COURT: Well—

MR. FREEDMAN: Before you make your ruling—

THE COURT: I was going to sustain the objection, but you might persuade me differently.

MR. FREEDMAN: You are going to sustain the objection. I have nothing to say.

THE COURT: Why don't you phrase your question without reference to the deposition.

BY MR. GOODMAN:

Q Is it your testimony in your opinion that the skills of white operating engineers and black engineers are equal or relatively similar?

A Yes.

Q And insofar as the willingness to travel outside of [12054] District 1, outside of the State of Pennsylvania, outside of the entire jurisdiction of Local 542, is it your testimony and opinion that insofar as whites and blacks are concerned race has nothing to do with that?

A Yes.

Q And insofar as—

MR. McGOLDRICK: I can't hear the answers to the questions.

THE WITNESS: Yes.

BY MR. GOODMAN:

Q And insofar as the willingness to work in the C branch or be a member of the C branch of Local 542 and do C branch work, is it your testimony and opinion based upon your experience that that too has nothing to do with race?

A I don't really know on that. We only have four or five members in the C branch.

Q You were talking, discussing during direct examination master mechanics. With regard to master mechanics, who has the power under the collective bargaining agreement to appoint master mechanics?

A The contractor.

Q Exclusively?

A Yes.

* * * *

[Trial transcript, pp. 12061-66]

[Witness H. G. Minckler]

[12061] additional part of the collective bargaining agreement that we signed. So we felt it was enforcible as a contract. We know it was required or something under that was required under the Philadelphia Plan. Now, what went through our minds regarding executive order I couldn't tell you.

THE COURT: All right.

BY MR. GOODMAN:

Q Did you receive a letter from Mr. Stalvey identifying certain minority recruitment sources which contractors who are affiliated with CAEP could utilize?

A Is that a question?

Q Yes, sir.

A I guess we did.

Q I hand you P-206 and ask you if that is a copy of the letter you received from Mr. Stalvey with the attached list of minority recruitment sources?

A Yes, I can remember that.

Q Did you distribute that list of minority recruitment sources to any of the contractors affiliated with CAEP?

A We notified the contractors we had a list available, but inasmuch as this list did not contain any trades or any of the people that we dealt with as heavy and highway contractors, we did not just distribute the list to our members.

Q How did you contact your members?

A Through bulleting.

[12062] Q In the last paragraph of P-206 Mr. Stalvey writes: "When utilizing these sources a contractor is urged to go to them with a specific job order in hand."

Can you identify one contractor that went to any one of these minority recruitment sources identified in the letter with a job in hand?

MR. McGOLDRICK: Objection, Your Honor. It's not his function to do that.

THE COURT: Objection overruled.

MR. McGOLDRICK: Additionally it goes beyond the scope.

THE COURT: I made my ruling on that.

THE WITNESS: Our function as an association was to keep the members aware of what was going on in the industry. We did not follow it beyond making them aware of what was available.

BY MR. GOODMAN:

Q So far as you know, did the contractors continue to rely on Local 542 referrals after you got that letter from Mr. Stalvey?

A Our collective bargaining unit required it.

Q Do you have up there a copy of the affirmative action agreement that you went over with Mr. McGoldrick this morning, P-7?

[12063] Q That is your signature on page 4?

A Yes, it is.

Q Who signed for John Buckley?

A One of the girls in the offices I had sign for John Buckley because my signature wasn't very close to Mr. Buckley's signature. He had authorized it.

Q Now, on page 1 there is a reference to Local 542 and its "affiliates." Could you identify who the affiliates are?

A I suppose it is 542-A, B.

Q Is that your understanding?

A This agreement as I said was part of our collective bargaining agreement. Our collective bargaining agreement between the Contractors Association of Eastern Pennsylvania and the union was between 542-A and 542-B.

Q Paragraph 3 on that first page indicates that there was a detailed analysis of the employment of minority group workers in the classifications covered by this agreement. As a result it was determined there was approxi-

mately 650 minority group members of Local 542 out of a total membership of 5400.

Are you aware of the existence of any such detailed analysis specifically?

A We requested Mr. Gentry regarding that when the program was given to us in Washington, and Mr. Gentry [12064] said that from what he had found out that that was a logical number. It was an estimate of the membership at that time.

THE COURT: Who is Mr. Gentry?

THE WITNESS: Mr. Gentry was the assistant for the Under Secretary of Labor for the Department of Labor that met with us when this program was given to us.

BY MR. GOODMAN:

Q Did Mr. Dawson ever advise you of that particualr figure of minorities in the union?

A I think we had some discussion that day when we had the discussion with Mr. Gentry, and I think Mr. Dawson reaffirmed the position that that was an estimate at that time.

Q Did he say it was a result of a detailed analysis?

A No, because I think at that time they had not had a detailed analysis.

Q Let me quote you from page 9725 of the trial transcript from the testimony of Mr. Dawson. He was asked by Mr. Reinstein this question: "You made a detailed analysis of minority group workers.

"Answer: We made an analysis by discussing with everybody involved how many minorities there were and this is the number that was, that we came up with." [12065] My question to you is did Mr. Dawson ever discuss it with you personally?

MR. FREEDMAN: I think he already answered that, Your Honor, and what he read just now is absolutely consistent with what the witness said.

THE COURT: Objection overruled.

Did Mr. Dawson ever discuss it with you?

THE WITNESS: At that meeting that day I think it was part of the general discussion that Mr. Dawson mentioned they had put an estimate together from the best method they could at that time.

BY MR. GOODMAN:

Q Now, on your direct testimony I think you indicated that the meeting you had was in the offices of the International Union of Operating Engineers. Is that correct?

A That's correct.

Q Who was present from the International?

A Reese Hammond, and Jim Gearey.

Q Had they come up with an affirmative action agreement in substance similar to P-7 and had that agreement been applied to the State of Ohio?

MR. FREEDMAN: Objection.

THE COURT: Overruled.

THE WITNESS: No, as I said this morning, [12066] this agreement was furnished to us by Mr. Gentry and the basis that they—that it had been developed for the trade in Ohio.

BY MR. GOODMAN:

Q Who did he say had developed it?

A I don't know if he said. We took it for granted that the government, the union and the contractors had probably been involved.

Q Did he indicate that the International had been involved in it?

A I suppose the International had been involved with it, but I don't know.

Q Did you ask?

A No.

Q Why was the meeting held at the offices of the International?

A We never asked that question either.

Q The result of the affirmative action agreement, at least one result, was to remove the operating engineers from the coverage of the Philadelphia Plan. Is that correct?

A Yes.

Q Now, this morning you also testified about the Peter Kiewet job at the Girard Point Bridge, is that correct?

A That's right.

* * * *

[Trial transcript, pp. 12093-12097]

[Witness H. G. Minckler]

[12093] Q Is that true from 1974 to the present time?

A From 1971 to the present time.

Q What about before 1971, were there two committees negotiating so far as the operating engineers were concerned?

A Yes, prior to 1971.

Q And both contractors, that is, the 29-county contractors and the five-county contractors, have had a contract to have an exclusive hiring hall provision with Local 542; is that correct?

A That's correct.

Q Now, in P-175 in the second and third sentences of the first paragraph I believe you essentially note that CAEP or the labor committee to CAEP has been doing or handling the bargaining for the United Contractors Association and the Pennsylvania Excavating Contractors Association. At least that is the sum and substance of those sentences, is that correct?

A That's correct.

Q Now, in addition to those two associations are there or were there any other associations on whose behalf the labor committee of CAEP negotiated insofar as the operating engineers were concerned?

A What year are you talking, 1968?

Q I was dealing with the past and the present. Why [12094] don't you give us the chronology if there is one?

MR. McGOLDRICK: Excuse me, Your Honor. I think the question is awfully vague. I think it should be more specific.

MR. GOODMAN: I will be glad to rephrase it.

BY MR. GOODMAN:

Q My question essentially was are there any other associations other than CAEP and PECA on whose behalf CAEP negotiated contracts, insofar as the operating engineers are concerned?

A Prior to 1971, no. Those are the only two groups that we bargained for. In 1961 we bargained jointly.

THE COURT: '61 or '71?

THE WITNESS: '61. In 1961 we bargained jointly with GBCA.

BY MR. GOODMAN:

Q Is the effect of that joint negotiation with GBCA word for word the same contract that ultimately resulted from the bargaining session?

A No. In '61 we had a split-up in the bargaining.

Q Did the result of GBCA's negotiations result from 1961 to the present time in an exclusive hiring hall system with Local 542?

A From 1961 to '71 GBCA bargained individually and CAEP bargained individually for its United and the [12095] Excavators. From 1971 on CAEP does not bargain with the operating engineers.

Q Who does?

A The Operating Engineers Employees of Eastern Pennsylvania and Delaware.

Q What is your position with that organization?

A I am chairman.

Q Who do they represent?

A They represent all the associations who had bargained with the operating engineers.

Q Would you identify them, please?

A There has been quite a splintering in that group, but Berks County Constructors, the Lehigh Valley Contractors Association, the Delaware Contractors Association, the Keystone Builders Association, GBCA, CAEP; in the 1971 negotiations we also represented the Wyoming Valley Contractors Association and the Scranton Builders Exchange.

In 1973 the Scranton Builders Exchange pulled out of the bargaining group, and in 1973 Wyoming Valley pulled out of the bargaining group.

Q Mr. Minckler, these, do these associations of contractor-employer have members in each of the districts of Local 542?

A I don't know what you mean by that.

Q Well, Local 542 has five districts covering the [12096] eastern half of Pennsylvania and the entire State of Delaware. The membership in the associations that you mentioned of contractors with work and who do work in each of those five districts?

A I still don't understand the question.

THE COURT: Let me see if I can rephrase it. You listed a whole series of associations, and those associations have members who are employers. Am I correct?

THE WITNESS: That's correct.

THE COURT: And do those associations have employers who are doing business in the area covered by 542?

THE WITNESS: Yes.

BY MR. GOODMAN:

Q Mr. Minckler—

MR. FREEDMAN: I don't think that was Mr. Goodman's question, Your Honor.

MR. GOODMAN: It was. I think I phrased it inarticulately. Thank you, Judge.

BY MR. GOODMAN:

Q Mr. Minckler, you mentioned that GBAC [*sic*] bargained I think you said for itself from 1961 to '71, is that correct?

A Yes, I believe that was the way—I seem to remember [12097] that's the way it was.

Q And the role of its bargaining with the union was in sum and substance the creation of the same kind of hiring hall system for its members as CAEP negotiated for itself?

MR. McGOLDRICK: Objection, Your Honor, mischaracterizing the record.

THE COURT: Overruled.

THE WITNESS: Well, will you repeat that, please?

BY MR. GOODMAN:

Q The role of the bargaining by GBCA with Local 542 included an exclusive hiring hall system, is that correct?

A Yes.

Q In P-175 the last paragraph—excuse me. Let me rephrase that. That was one question that I forgot to ask you in the prior line. Am I correct the individuals on the labor committee for CAEP, both labor committees have been white?

A Yes.

Q Has that been true from—strike that, that is unnecessary.

Has that be [*sic*] equally true of the association that now bargains with the operating engineers?

A Yes.

• • • •

[Trial transcript, pp. 12215-16]

[Witness McIlhill]

[12215] the line of testimony about his relatives. He should have been asked that on direct examination, I mean in terms of your case, and it is not rebuttal.

Do you have any other questions of this witness?

MR. GOODMAN: Yes, sir.

BY MR. GOODMAN:

Q Mr. McIlhill, when you were acting as dispatcher in District 1 did employers advise you of how long they would need operating engineers to work?

MR. FREEDMAN: Objection, Your Honor, that is not rebuttal.

MR. GOODMAN: Your Honor, it absolutely rebuts Mr. Dawson's testimony on that point.

THE COURT: Objection overruled.

MR. McGOLDRICK: How would he know, Your Honor?

MR. GOODMAN: He knows because—

MR. McGOLDRICK: How would Mr. Goodman know?

THE COURT: That is beside the point. Mr. Dawson testified on it. I will see if it is in rebuttal.

BY MR. GOODMAN:

Q Were you advised by contractors when they called you for operating engineers as to what the length of the job [12216] would be?

A Most of the time, yes.

Q While you were acting as dispatcher for Local 542 were the groups 2 and 3 out-of-work lists posted?

A No, it was not.

Q While you acting as dispatcher were daily changes made in the posted group 1 out-of-work list?

A No.

Q When you took office as dispatcher or began duties as dispatcher did you examine the work records?

A Yes, I looked at the work records.

Q Were they neatly kept?

A Some of them were sloppy, but—there were some sloppy records there, yes.

Q While you were acting as dispatcher were you asked to refer operating engineers to—in District 1 to other districts of Local 542?

A Yes.

Q Would that be rare or would it be frequent?

A Well, that would be rare. Yes, it was rare. At that time economic conditions in the Philadelphia area were bad. There was a lot of work in the Wilkes-Barre area. I have had six or seven calls from that area.

Q Six or seven calls during what period of time? How long were you dispatcher?

* * * *

[Trial transcript, pp. 12222-23]

[Witness McIlhill]

[12222] testified in certain instances business managers appointed master mechanics and in other instances employers appointed them.

THE COURT: I will permit the testimony for whatever it is worth.

THE WITNESS: Will you repeat the question again?

BY MR. GOODMAN:

Did political favoritism or partisanship ever have anything to do with the appointment of master mechanics?

A I would say in the union it's helpful, yes.

Q Now, since you have been on the executive board since 1963, are you aware of any rules that the executive board has promulgated or put into effect with regard to transfers from the C branch to any other branch of the union?

A I don't know of any rule. I don't recall any rule.

MR. McGOLDRICK: Again, Your Honor, I object to that question and move the answer be stricken because it is not rebuttal.

THE COURT: Denied.

BY MR. GOODMAN:

Q Now, with regard to independent contractors who aren't affiliated with any particular associations, based upon your personal experience do those normally sign the standard collective bargaining agreement?

[12223] MR. McGOLDRICK: Objection, Your Honor. That is also beyond the scope.

THE COURT: Overruled.

THE WITNESS: Independents normally sign the standard agreement, yes.

BY MR. GOODMAN:

Q Do you ever recall of one instance where an independent signed the standard collective bargaining agreement?

A I don't know of any.

Q Does that agreement include the exclusive hiring hall system and the out-of-work list system?

A Yes.

Q Is that the same one that is on file with the associations?

A Same contract, yes.

Q Now, since 19—you were appointed as assistant to the business manager in 1961, is that right?

A Yes, '60 or '61.

Q Who has handled Mr. Walsh's correspondence since that time?

A I did most of it.

Q Who wrote his letters?

A I did.

Q Did he write them, or did you?

A I wrote them.

* * * *

[Trial transcript pp. 12482-83]

[12482] listed as an exhibit. Dr. Siskin describes the coding project in which he put this on a tape. The tape

was turned over to the defendants. In fact, Your Honor, the tape was used by Dr. Perl. If Your Honor looks at pages—

THE COURT: There is a big difference between a tape and a printout, just as there is a difference between a map and an actual trip which one takes.

Let me tell you I have made up my mind on this tentatively. Mr. Reinstein, either this document will be excluded or I will give defendants the right to have surrebuttal on Tuesday. You are not going to have it both ways.

MR. REINSTEIN: Your Honor, could I move in the alternative for certain portions of the documents to be admitted?

THE COURT: No. No half loaves. If you want to move in P-690, I am going to give them the right for surrebuttal for whatever time it takes.

MR. REINSTEIN: Your Honor, I will have to consult with Mr. Goodman on that.

THE COURT: All right, we will take a recess.

(Brief recess.)

MR. REINSTEIN: Your Honor, we decided to [12483] withdraw our objection to admit P-690.

THE COURT: All right. 690 is excluded.

(Exhibit P-690 was excluded.)

THE COURT: Let me mark my sheet.

All of the testimony of Dr. Siskin as it pertains to 690 is excluded. This is without prejudice to the plaintiffs making any reference in their briefs to anything which is of record on it.

Now, I gather that the plaintiffs are ready to rest so far as live testimony is concerned.

MR. REINSTEIN: Yes, sir. We have some exhibits.

THE COURT: All right. Let's deal with your exhibits. What are they that you are moving?

MR. REINSTEIN: I sent a letter to Your Honor, which I think you should have gotten yesterday, which lists all our exhibits.

THE COURT: I am certain you sent it to me. I am certain I got it.

Any objection to any of these exhibits, Counsel?

MR. FREEDMAN: To the admission of these documents?

THE COURT: Yes.

MR. FREEDMAN: Absolutely, as he presents

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

PETITION OF NONPARTIES UNITED ENGINEERS & CONSTRUCTORS INC., CATALYTIC, INC., FLUOR CORP. AND BECHTEL CORPORATION FOR LEAVE TO FILE MOTION AND SUPPORTING MEMORANDUM OF LAW

United Engineers & Constructors Inc., Catalytic, Inc., Fluor Corp. and Bechtel Corporation (hereinafter the "Petitioners") petition the Court for leave to file a motion and supporting memorandum of law in this proceeding.

In their proposed motion, Petitioners, who have been designated members of a defendant class of contractor-employers, intend to argue (1) that this Court lacks jurisdiction over them and is therefore without power to enter an in personam monetary judgment against them; (2) that this case does not meet the requirements of Fed.R.Civ.P. 23 for a defendant class of contractor-employers and that the Court should therefore enter an order vacating its determination to permit this action to proceed as an action against such a class; (3) alternatively, that the defendant class could not have been properly permitted pursuant to Rule 23(b)(2), and that the Court should therefore make the class subject to Rule 23(b)(3) so that Petitioners will be able to opt out of the class; and (4) that all claims against the Petitioners should be dismissed. Petitioners would like to make their motion at the conclusion of the presentation of evidence in the liability phase of the case, but before the Court has rendered a decision on liability.

Petitioners seek leave to file this motion on the condition and understanding that their filing of it will be without prejudice to their position as nonparties to this

litigation. Specifically, Petitioners respectfully seek an order by the Court permitting their filing of such a motion, but providing that their doing so will not be construed as consenting to the jurisdiction of this Court or as a waiver of any other arguments they might have.

[Signatures Omitted in Printing]

[Filed July 8, 1977]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

MOTION TO DISMISS ALL CLAIMS AGAINST THE DEFENDANT SUB-CLASS OF CONTRACTOR-EMPLOYERS AND TO DECERTIFY THE SUB-CLASS OR, IN THE ALTERNATIVE TO RECERTIFY IT PURSUANT TO RULE 23(b)(3)

Pursuant to the petition filed on July 8, 1977, and granted by this Court on October 7, 1977, Petitioners United Engineers & Constructors Inc., Catalytic, Inc., Fluor Corp. and Bechtel Corporation hereby move this Court for an order dismissing all claims for relief against them on the grounds that this Court lacks jurisdiction over them and that Plaintiffs and their class are not entitled to relief from Petitioners. Petitioners also move this Court for an order vacating its determination to permit this action to proceed as an action against a defendant class of contractor-employers or, in the alternative, to recertify the class pursuant to Rule 23(b)(3) so that Petitioners will be able to opt out of the class.

The arguments in support of the motion are set forth in the accompanying memorandum of law.

[Signatures Omitted in Printing]

[Filed November 4, 1977]

January 18, 1978

Honorable A. Leon Higginbotham, Jr.
22613 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Re: *Commonwealth et al. v. Local 542, et al.*
Civil Action No. 71-2698

Dear Judge Higginbotham:

At page 97 of Plaintiffs' Post-Trial Brief Sur Liability and Remedy, Plaintiffs indicated an intention to file a Motion to Amend the Complaint to allege Title VII jurisdiction over the named and class defendant contractor associations and contractor-employers.

Plaintiffs have reconsidered our position and will not be filing such a motion.

Very truly yours,

HAROLD I. GOODMAN
Employment Law Project

HIG:gmf

cc: Abraham E. Freedman, Esquire
Thomas J. McGoldrick, Esquire
Martin Wald, Esquire
Arthur R. Littleton, Esquire
David N. Sexton, Esquire
Marvin I. Barish, Esquire
M. Faith Angell, Esquire

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

[Excerpt from Transcript of Proceedings, Jan. 30, 1978, p. 108]

[108] you get the brunt of it, but I mean this is what happens. You see, you have 1400 contractors. Presumably, the contractor doesn't have the out-of-work list.

MS. ASPENWALD: [*] Correct.

THE COURT: He does not have it before him. So how is the contractor going to know whether Heenan's son or Walsh's son or Ciavaglia's son or anyone of the nepotism practices are or are not in order?

MS. ASPENWALD: I don't think that any particular contractor is going to know that the out-of-work list is not necessarily going according to order. I mean I think that that would be difficult for a contractor to know, as your Honor says, because they don't presumably have the out-of-work list in front of them.

Essentially though, for at least some of the contractors certainly who hired say Mr. Walsh's sons, Mr. Heenan's son, or families got referred to certain contractors, those contractors would have had to have known that there was something wrong with that union, that the union—not that there was something wrong with the union, but that the union didn't operate according to the hiring hall practices they were supposed to.

[* Counsel for individually named and class plaintiffs.]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

ORDER

AND NOW, this 30th day of November, 1978, upon consideration of Plaintiffs' motion to redefine and recertify the plaintiff and defendant classes, and the objections raised in opposition thereto, it is hereby ORDERED, for the reasons expressed in the Opinion, filed today, that Plaintiffs' motion is GRANTED, with modifications, as follows:

The Plaintiff class is defined as follows:

(a) For all claims arising under Title VII of the Civil Rights act of 1964, as amended, 42 U.S.C. § 2000e, the plaintiff class shall include all minority persons (i.e., blacks, Spanish-Surnameds, Orientals and American Indians) who:

(1) Were members, registrants, apprentices or otherwise affiliated with defendant Local 542 at any time between April 30, 1968, and the date of this decree;

(2) Applied for membership or affiliation with defendant Local 542 but were deterred from doing so because of Local 542's discriminatory practices, at any time between April 30, 1968, and the date of this decree; and

(3) Apply for membership or affiliation with defendant Local 542 from the date of this decree until this Court dismisses jurisdiction over this action.

(b) For all claims arising under the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§ 1981 and 1985

(3), and under 29 U.S.C. § 158, the plaintiff class shall include all minority persons who:

(1) Were members, registrants, apprentices or otherwise affiliated with defendant Local 542 at any time between November 8, 1965, and the date of this decree;

(2) Applied for membership or affiliation with defendant Local 542, or who would have applied for membership or affiliation with Local 542 but were deterred from doing so because of Local 542's discriminatory practices, at any time between November 8, 1965, and the date of this decree; and

(3) Apply for membership or affiliation with defendant Local 542 from the date of this decree until this Court dismisses jurisdiction over this action.

The Defendant Class is defined as follows:

(a) All employer associations who have been parties to a collective bargaining agreement with defendant Local 542 at any time between November 8, 1965, and the date of this decree; and

(b) All employers who have been parties to a collective bargaining agreement with Local 542 and who hired at least one operating engineer affiliated with Local 542 at any time between November 8, 1965, and the date of this decree.

This order is to be impounded until the opinion filed today is released from impoundment.

BY THE COURT:

/s/ A. Leon Higginbotham
United States Circuit Judge
Sitting by designation

[Opinion of the District Court, November 30, 1978 (469 F. Supp. 329) is reprinted at pp. 2-181 of the Appendix to Petition for Certiorari in No. 81-280.]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

ORDER

AND NOW, this 2nd day of January, 1979, it is hereby ORDERED and DECREED that the opinion and orders impounded on November 30, 1978 are to be released from impoundment as of this date.

BY THE COURT:

/s/ A. Leon Higginbotham
C.J.
United States Circuit Judge
sitting by designation

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

PLAINTIFF COMMONWEALTH OF PENNSYLVANIA'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' PROPOSED ORDER FOR INJUNCTIVE RELIEF

I. COMPENSATORY DAMAGES FOR THE COMMONWEALTH.

In paragraph 53 of plaintiffs' Proposed Order, the Commonwealth takes the position that it should be entitled to present evidence in the Stage II proceedings on the issue of the award of compensatory damages to the Commonwealth. Defendants' Proposed Orders delete any mention of compensatory damages for the Commonwealth, and in their Memoranda of Law, they specifically take exception to the notion of compensatory damages for the Commonwealth.

Early in this case, the Court upheld the standing of the Commonwealth to sue as parens patriae. In the Third Circuit, it has been held that the state's right to sue as parens patriae encompasses suits to protect the state's proprietary interests or to protect its quasi-sovereign interests, such as the health, comfort and welfare of its citizens and the general economy of the state. Moreover, the state's right to sue as parens patriae includes the right to recover damages. *Commonwealth of Pennsylvania by Sheppard v. National Association of Flood Insurers*, 520 F.2d 11 (3d Cir. 1975); *Commonwealth of Pennsylvania v. Glickman*, 370 F. Supp. 724 (W.D. Pa. 1974); *Commonwealth of Pennsylvania ex rel Rafferty*, 356 F. Supp. 500 (E.D. Pa. 1973).

In the *National Association of Flood Insurers* case, the Commonwealth attempted to sue for damages alleging that the failure of the flood insurers to advertise the

availability of flood insurance as required by federal law had resulted in substantial injury to the Commonwealth's own property and to property of the citizens of Pennsylvania during Hurricane Agnes. The claim for damage to the Commonwealth's own property was denied solely because the Commonwealth had failed to exhaust its administrative remedies. Thus, the denial on this claim was based only on procedural grounds. As to the second claim, the Commonwealth was not granted standing as parens patriae because there was no showing of a direct interest of the state's own apart from the private injury to its citizens.

In the *Glickman* and *Rafferty* cases, it was found that the racially discriminatory employment practices of the defendants impaired the welfare of the state's citizens and as such constituted a direct injury to the state's own interest as parens patriae. In those cases, despite the recognition of the state's right to recover damages, no award was made because the state had sought only injunctive relief and not compensatory damages.

In the instant case, the Court in its Opinion has found that the defendants have engaged in racially discriminatory employment practices. As in *Glickman* and *Rafferty*, said conduct on the part of the defendants has impaired the welfare of the state's citizens, giving rise to the state's right to recover damages as parens patriae. Further, the racially discriminatory actions of defendants directly affected the state's economic interests by making necessary welfare payments and other assistance to persons who, because of the defendants' discrimination against them, could not support themselves. Clearly, the Commonwealth should be permitted to recover for the losses thus incurred.

The Court of Appeals in footnote 24 of the *National Association of Flood Insurers* case expressed concern over the possibility of duplicative damages should damages be permitted the Commonwealth on the basis of the

private injury to its citizens. 520 F.2d at 22. Similarly, the Circuit Court in the District of Columbia, while intimating that in the proper context damages to a state as parens patriae might be appropriate, expressed concern over the possibility of duplicative damages. *Commonwealth of Pennsylvania by Shapp v. Kleppe*, 533 F.2d 668 (D.C.C. 1976). However, the concern over duplicative damages does not apply in the instant case since individual plaintiff would be awarded damages in the nature of back pay, while the Commonwealth would be awarded damages on the basis of the direct economic losses it suffered, such as public assistance payments and the approximately one million dollars it was induced to expend on a program that ultimately served to impair the welfare of the state's citizens.

In a Supreme Court case, *Hawaii v. Standard Oil Company*, 405 U.S. 251 (1972), the Court found that the state was entitled to recover damages on the basis of its proprietary interests. On that basis, the Commonwealth is entitled to recover compensatory damages in this case.

Defendants' argument that the Commonwealth has not proved it suffered economic losses is of no moment, for the Commonwealth need not prove its actual damages until Stage II. What is important is that as a prevailing party, the Commonwealth is now entitled to prove its damages in Stage II. In any event, there was testimony by Commonwealth witnesses of expenditures by the Welfare Department, the Bureau of Vocational Rehabilitation, and the Department of Community Affairs. In addition, individual plaintiffs testified that they had to receive assistance from the state as a result of defendants' discriminatory actions. Thus, there is certainly a foundation upon which the Commonwealth can build its case for compensatory damages in Stage II.

II. ATTORNEYS' FEES FOR THE COMMONWEALTH

In paragraph 71 of Plaintiffs' Proposed Order, plaintiffs state that an award of attorneys fees and costs should be made to the Commonwealth. Defendants' Proposals make no provision for an attorneys fees award to the Commonwealth.

The Union at page 29 of its brief takes the position that *Commonwealth of Pennsylvania v. O'Neill*, 431 F. Supp. 700 (E.D. Pa. 1977), *aff'd* 573 F.2d 1031 (3d Cir. 1978), stands for the proposition that the Commonwealth may be awarded costs but not attorneys fees. However, in that case, the Commonwealth did nor request an award of attorneys fees. Hence, no award was made.

Under 42 U.S.C. Sec. 1988, the prevailing party may be awarded attorneys fees. While the Commonwealth has never before sought an award of attorneys fees as a prevailing plaintiff under 42 U.S.C. Sec. 1988, it has sought and been awarded attorneys fees as a prevailing defendant in a Title VII case (42 U.S.C. Sec. 2000e-5 (k), *Kutska v. California State College*, 564 F.2d 108 (3d Cir. 1977). While the state has not sued as parens patriae in that case, Title VII defines "person" to include a state and the Court specifically stated that the same standards in determining the appropriateness of an award of attorneys fees to any other prevailing defendant should apply in determining the propriety of such an award to a state as prevailing defendant. 564 F.2d at 110-111. Similarly, under both Title VII and 42 U.S.C. 1988, the standards for determining the appropriateness of an award of attorneys fees to any other prevailing plaintiff should govern the determination of such an award to the Commonwealth in the instant matter.

III. CONCLUSION

For the reasons stated above, the Commonwealth respectfully urges that the Court incorporate in its Order for Injunctive Relief paragraphs 53 and 71 of Plaintiffs' Proposed Order.

[Signatures Omitted in Printing]

[Filed April 27, 1979]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

MEMORANDUM ON BEHALF OF LOCAL 542 IN RESPONSE TO THE COMMONWEALTH OF PENNSYLVANIA'S SUPPLEMENTAL MEMORANDUM

Subsequent to the April 24, 1979 oral argument in this matter, the Commonwealth of Pennsylvania ("the Commonwealth") submitted a document entitled "Plaintiff Commonwealth of Pennsylvania's Supplemental Memorandum of Law in Support of Plaintiffs' Proposed Order for Injunctive Relief" ("Commonwealth's Supplemental Memorandum"). Pursuant to the Court's directive at the oral argument, Local 542, International Union of Operating Engineers ("Local 542"), submits this memorandum in response to the Commonwealth's Supplemental Memorandum.

ARGUMENT

I. THE INJUNCTIVE DECREE ISSUED BY THE COURT SHOULD NOT PROVIDE FOR THE RECOVERY OF COMPENSATORY DAMAGES BY THE COMMONWEALTH.

In Paragraphs 53 and 65 of their proposed decree (filed February 7, 1979), plaintiffs propose that during Stage II of this litigation the Commonwealth should be permitted to seek "compensatory damages" for unspecified injuries it allegedly has suffered. By its Supplemental Memorandum the Commonwealth purports to provide legal authorities for such a proposal. As is set forth below, the proposal is unwarranted on several grounds.

A. The Commonwealth Should Not Be Permitted To Assert any New Theories of Liability at This Phase of the Litigation.

In over seven years of litigation the Commonwealth never pleaded or otherwise articulated its basis for maintaining a claim in its own right. Neither the Complaint nor the Commonwealth's opposition (dated December 30, 1971) to defendants' motion to dismiss it as a party makes any reference to a damage claim by the Commonwealth. To the contrary, these documents characterize the Commonwealth's role as essentially seeking to join in the private plaintiffs' efforts to redress alleged discrimination against the plaintiff class. Moreover, during the liability phase of this case the Commonwealth failed to present evidence sufficient to support any independent claim. The Commonwealth's failure of pleading or proof is strikingly evidenced by the fact that the proposed decree and supporting memorandum submitted by plaintiffs after the close of trial (filed September 6, 1977) make absolutely no mention of any separate claim by the Commonwealth. Nor does the Court's January 2, 1979 Memorandum Opinion make any reference to such a claim.

In its response (filed February 28, 1979) to plaintiffs' proposed decree, Local 542 noted that the Commonwealth had neither cited any authority to support a separate claim for compensatory damages nor provided any indication of the factual basis of the claim. The Commonwealth's Supplemental Memorandum does little to correct this vagueness. It cites no specific legal basis for its claim, relying instead on the mere incantation of the phrase "*parens patriae*." It also gives only the most general indication of the factual basis of its claim, requesting instead that further specificity be deferred until Stage II.

The purpose of Stage II proceedings, however, is to determine the individual entitlement of the members of

the plaintiff class, not to allow an individual plaintiff—the Commonwealth—to seek damages on claims it professes to possess but as to which it has failed to articulate a theory, let alone prove liability. Nor should the Commonwealth be permitted, as it apparently seeks, to use its own failure of pleading or proof as a basis for obtaining a chance to do in Stage II what it should have done in Stage I. To allow the Commonwealth to advance new claims at this time would be inconsistent with the Federal Rules of Civil Procedure, including Rules 8 and 15, and would be highly prejudicial to defendants.[1] For this reason alone, the Commonwealth's proposal should be rejected.

B. The Commonwealth's Legal Theories Are Unsound.

Even apart from the Commonwealth's failure to plead or prove any claims in timely fashion, its proposal must be rejected as legally unsound. As the cases cited in the Commonwealth's Supplemental Memorandum make clear, in order to assert a claim as *parens patriae* the Commonwealth must satisfy at least two requirements. First, like any other party plaintiff, it must properly plead and prove a claim falling within a cognizable legal

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[1] Rule 8(a) requires that any claim set forth (1) its jurisdictional basis, (2) "a short and plain statement of the claim," and (3) a statement of the relief sought. The Commonwealth has failed to meet any of these requirements, and thus has frustrated the purpose of the Rule, which is to give the adverse party fair notice of the nature of all claims being asserted against it. *See generally* C. WRIGHT & A. MILLER, 5 FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 1202, 1215 (1969 ed.) ("WRIGHT & MILLER"). Nor would amendment of the Complaint under Rule 15(a) to include new claims by the Commonwealth be appropriate at this point in light of the prejudice to defendants resulting from the Commonwealth's unjustified delay in asserting any separate claims. *See* WRIGHT & MILLER, *supra*, at Vol. 6, § 1487. Amendment would also be improper under Rule 15(b), since that provision authorizes only amendments "to conform to the evidence" already presented.

theory and must properly invoke the jurisdiction of the Court. *See, e.g., Hawaii v. Standard Oil Co.*, 405 U.S. 251, 259 (1972) (apart from whether the state may sue as *parens patriae*, Court must "determine whether the injury for which it seeks to recover is compensable under" the statute in question); *Commonwealth of Pa. v. National Ass'n of Flood Insurers*, 520 F.2d 11, 25 (3rd Cir. 1975) (applying statutory dollar limit to *parens patriae* claim). Second, the Commonwealth must also establish that the injury for which it seeks redress satisfied the requirements of the *parens patriae* doctrine. As is set forth below, the Commonwealth has failed to satisfy either requirement.

1. Neither Title VII Nor 42 U.S.C. § 1981 Supports the Commonwealth's Claim.

Apart from its failure to plead or prove any claims under Title VII or § 1981, any claim the Commonwealth might raise under those statutes is legally deficient on several grounds. To the extent that the Commonwealth seeks to assert a claim *in its own behalf* under Title VII, it has failed to comply with the jurisdictional prerequisite of that statute set forth in 42 U.S.C. § 2000e-5. The Commonwealth has not filed a charge of discrimination with the EEOC or obtained a notice of right to sue, each of which is a jurisdictional prerequisite to suit under Title VII. *See, e.g., Davis v. Pepsi Cola Bottling Co.*, 18 FEP Cases 531 (E.D. Pa. 1978).

Although the Court might have jurisdiction over a claim by the Commonwealth under § 1981, neither that provision nor Title VII authorizes the Commonwealth to recover damages for the type of injuries it suggests it has suffered here.[2] Of course, Title VII authorizes only

[2] The Commonwealth has suggested two possible theories: injury to the welfare of its citizenry in general because of discrimination, and injury resulting from the payment of public assistance to class members. Commonwealth's Supplemental Memorandum at 2. With

equitable remedies including back pay in appropriate cases), and not "compensatory damages." *See Richerson v. Jones*, 551 F.2d 918, 926-27 n.13 (3rd Cir. 1977). Moreover, the Commonwealth has not cited any authority, nor is Local 542 aware of any, supporting the right of *any party*—governmental or private—to maintain a suit under either Title VII or § 1981 to obtain financial recovery from the indirect effects of alleged discrimination against other persons.

Commonwealth of Pa. v. Glickman, 370 F. Supp. 724 (W.D. Pa. 1974), cited by the Commonwealth, is inapposite. In *Glickman* the court declined to dismiss the Commonwealth as a plaintiff in a race discrimination action (under 42 U.S.C. §§ 1981 and 1983) and alluded in dictum to the possibility that a state acting as *parens patriae* could recover damages. However, the court in *Glickman* ordered only injunctive relief to revise the defendant's hiring procedures; the Commonwealth did not recover damages, nor did its presence allow any relief that would not also have been appropriate in its absence.[3]

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respect to the first theory, the Commonwealth gives no indication how this might support a claim for damages as opposed to injunctive relief. And, with respect to the second, the Commonwealth has offered no evidence to establish that the acts complained of affected the *total* level of public assistance payments (as opposed to affecting the identity of the specific individuals to whom payments may have been made).

[3] Even the limited approach to state participation in discrimination actions allowed in *Glickman* has been expressly considered and rejected by the United States District Court for Maryland. Prince George's County, Md. v. Levi, 79 F.R.D. 1, 4 n.4 (D. Md. 1977). Nor does Commonwealth of Pa. ex. rel. Rafferty v. Philadelphia Psychiatric Center, 356 F. Supp. 500 (E.D. Pa. 1973), support the Commonwealth's position. At page 2 of its Supplemental Memorandum, the Commonwealth states that in *Rafferty* the court allowed the Commonwealth acting *parens patriae* to challenge alleged racial discrimination. This statement is incorrect. Although involving § 1981, *Rafferty* involved alleged deprivation of the constitutional right to free speech, not racial discrimination. More-

Were the courts to accept the theory implicitly advanced by the Commonwealth—that damages are available to any party affected by alleged discrimination in any way, directly or indirectly—there would be no end to litigation under Title VII and § 1981. Indeed, under its theory the Commonwealth should be a party to every private lawsuit in which "wrongs" *of any sort* are alleged or in which the subject matter of the dispute has an arguable effect, direct or indirect, on some aspect of state revenue or taxation. In the absence of legislative or judicial support for such an interpretation, this Court should reject the Commonwealth's theory. *Cf. Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977) (absent "clear directions from Congress to the contrary," section 4 of the Clayton Act interpreted to preclude antitrust damage actions by persons other than direct purchasers).

2. The Injuries Claimed by the Commonwealth Do Not Meet the Requirements of the Doctrine of *Parens Patriae*.

The courts have recognized that, in appropriate circumstances, a state acting as *parens patriae* may bring suit to vindicate its "quasi-sovereign" interests. *See Hawaii v. Standard Oil Co., supra; Flood Insurers, supra. As the Third Circuit has stated*:

> A "quasi-sovereign" interest must be an interest of the State existing separate and apart from those injuries suffered individually by the State's citizens. . . . What must be at stake is the State's independent interest. . . .

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over, although the court in *Glickman* relied on dictum in *Rafferty* that in appropriate circumstances a state acting as *parens patriae* may seek damages, the actual holding in *Rafferty* was that the Commonwealth lacked a sufficiently discrete and independent interest in the dispute to have standing to sue as *parens patriae*. 356 F. Supp. at 505-06.

Flood Insurers, supra, 520 F.2d at 22 (citation omitted). Accordingly, the doctrine of *parens patriae* would not allow the Commonwealth to seek to vindicate the rights of the individual class members in this case:

> [T]he State must show a direct interest of its own and not merely seek redress for private parties, who, being the real parties in interest, could themselves have prosecuted their own particular claims.

Id. Here, of course, the private parties have prosecuted their claims.

Neither of the belatedly asserted factual bases of the Commonwealth's claim (*see* Footnote 2 above) would support a *parens patriae* action. As the D.C. Circuit noted in *Commonwealth of Pa. by Shapp v. Kleppe*, 533 F.2d 668, 678 (D.C. Cir. 1975), *cert. denied*, 429 U.S. 977 (1976), standing to maintain a *parens patriae* action may be found only where the state seeks "to challenge actions whose clear and direct effects would be the *substantial disruption* of the state's internal economy and impairment of the well-being of the citizenry." (Emphasis added, footnote omitted.) The court further noted in *Kleppe* that "the sufficiency of the injury actually alleged is highly contingent on other relevant factors bearing on the appropriateness of letting the plaintiff state pursue the case on the merits," *id.*, including the extent to which the wrong alleged is generalized or particularized. Accordingly, not only can the state not seek to redress individual rights, but also:

> there can be no standing in the state where the primary thrust of an alleged wrong is injury to a narrowly limited class of individuals and the harm to the economy as a whole is insignificant by comparison.

Id. (footnote omitted).

Applying the above principles to this case, it is clear that the doctrine of *parens patriae* does not support the Commonwealth's claims. The wrongs alleged in this action relate to a relatively small number of individuals,

and any injury the Commonwealth or the citizenry might have suffered are highly speculative and relatively "insignificant by comparison."

II. THE COMMONWEALTH IS NOT ENTITLED TO AN AWARD OF ATTORNEYS' FEES.

The Commonwealth's request for an award of attorneys' fees is unwarranted. It is neither a member nor a proper representative of the plaintiff class, and thus is not entitled to an award of fees on the same basis as counsel for the class. Nor, as discussed in part I.B.2 above, is the Commonwealth authorized as *parens patriae* to litigate on behalf of the plaintiff class or any of its individual members. For these reasons, notwithstanding the fact that the Commonwealth may have been a signatory to pleadings submitted on behalf of the plaintiff class, it is not entitled to receive fees based on the resolution of the class claims.

Moreover, as discussed in part I above, the Commonwealth has failed to establish any claims in its own right under Title VII or § 1981 and should not be permitted to seek to do so in Stage II. Thus, the Commonwealth cannot be considered a prevailing party with respect to any separate claims.

Finally, the Commonwealth has failed to cite any authority supporting its claim for attorneys' fees in this case. Its reliance on *Kutska v. California State College*, 564 F.2d 108 (3rd Cir. 1977) is misplaced. In *Kutska* the state was not a plaintiff, but a defendant in essentially the same position as any other Title VII defendant.

CONCLUSION

For the reasons set forth above and in Local 542's previous memorandum, this Court should not include in its injunctive decree any provision for the recovery of damages or attorneys' fees by the Commonwealth.

[Signatures Omitted in Printing]

[Filed May 7, 1979]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

MOTION TO PRESERVE STATUS QUO

For the reasons set forth in the attached supporting Memorandum, defendant, Local 542, International Union of Operating Engineers, moves the Court for an Order preserving the *status quo* with respect to the exclusive hiring hall system. Specifically, the Union requests an Order directing the defendant employers to observe the provisions of the current collective bargaining agreements relating to the hiring hall pending issuance of the Court's final Remedial Decree in this case.

[Signatures Omitted in Printing]

[Filed July 17, 1979]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

MEMORANDUM IN SUPPORT OF MOTION TO PRESERVE STATUS QUO

On January 2, 1979, the Court released its Opinion on liability in this case finding, *inter alia*, that the operation of the hiring hall had had a discriminatory effect upon minorites. The Opinion flatly stated, however, that the hiring hall was not *per se* illegal. Subsequently, the parties submitted proposed remedial decrees, and oral argument was held on the relief issues on April 24, 1979.

The Court now has under advisement all issues relating to appropriate relief, including the continuation of the hiring hall and the manner in which it should be operated. In meetings with counsel for all parties on July 2, 1979, the Court established the following procedure to complete the trial phase of these proceedings:

(1) The Court will complete its Remedial Decree and file it with the Clerk under seal;

(2) By July 13, the plaintiffs will submit to opposing counsel a final settlement proposal on five major points delineated at the July 2 conference;

(3) By July 20, the Union and the contractors will file their final settlement proposals on the same five points;

(4) On August 7, the Court will meet with all counsel to present its views on settlement of the five points;

(5) If agreement is not reached as a result of the August 7 conference, the Court will release its Remedial Decree from impoundment.

Independent of the above Federal Court proceedings, Operating Engineers Employers of Eastern Pennsylvania and Delaware (made up of defendants and defendant

class members in this case) requested arbitration on the issue of whether they must continue to observe the terms of their collective bargaining agreements with the Union that provide for the exclusive hiring hall. A hearing was held before the arbitrator on April 27, 1979. The Union objected to the jurisdiction of the arbitrator on several grounds, particularly noting the pendency of this issue before the Court wherein the identical contentions have been made by the employers (the Union's Brief to the arbitrator is attached hereto as Exhibit A). Nevertheless, the arbitrator issued his opinion on July 16, 1979 (attached hereto as Exhibit B).

The arbitrator's opinion, purporting to construe this Court's January 2 Opinion, concluded that the contractors are "legally excused from performing in accordance with [the hiring hall provisions of the collective bargaining agreement] unless and until Judge Higginbotham is reversed or modified" (p. 16). The arbitrator thus has stepped into the middle of the controversy now before the Court as to the hiring hall and has precipitously decided it. By this Motion, the Union requests that the Court enter an Order preserving the *status quo* by directing the parties to observe the terms of the collective bargaining agreement regarding the hiring hall pending issuance of the Court's decision.

We should make clear, also, what we are *not* asking the Court to do at this time: We are *not* asking the Court to decide by this Motion the status of the hiring hall; we are asking the Court to preserve the *status quo* for the limited remaining period before it does resolve the hiring hall issue. We are *not* asking the Court to set aside the arbitration award at this time; we are asking the Court to preserve the *status quo* by directing the parties to refrain from abandoning the hiring hall while the issue is before the Court.

We do, of course, read the Court's January 2, 1979 Opinion differently from the arbitrator. In our view, the Court has found that, while not illegal *per se*, the

hiring hall in operation has discriminated against minorities, and that safeguards must be imposed to ensure nondiscriminatory hiring in the future. The Union has proposed such safeguards in its Injunctive Decree: e.g., affirmative injunctive provisions, goals, reporting and monitoring. But, the purpose of this Motion is not to re-argue the hiring hall issue. Rather, we are seeking merely to obtain temporary relief from the arbitrator's precipitous action that infringes on the Court's jurisdiction, leaves the parties without *any* procedures or guidelines to govern hiring, and creates the spectre that hiring decisions made between now and the final Court Decree would have to be undone somehow after the Court rules.

The Union advances this Motion now, and in this form, because of the time pressures imposed by the arbitrator's opinion. The employers are "legally excused" from observing the hiring hall provisions as of now, at the height of activity in the industry. Hiring decisions must be made daily. The harm to the Union is apparent: Seniority expectations of whites and minorities alike may be defeated now, by unfettered actions of the employers. Restoration of those rights would be difficult, if not impossible. The measure we propose is logical and limited: Preservation of the status quo while the parties and the Court bring the identical issue to conclusion in the Court proceedings, which are now at the critical stage.

Because of the exigencies of the situation, we respectfully request waiver of the five day notice requirement that normally governs the presentation of motions.

[Signatures Omitted in Printing]

[Filed July 17, 1979]

EXHIBIT A

No. 14 30 0309 79 H

OPERATING ENGINEERS, LOCAL 542

—and—

OPERATING ENGINEERS EMPLOYERS OF EASTERN PENNSYLVANIA and DELAWARE

BRIEF IN SUPPORT OF OPERATING ENGINEERS LOCAL 542

As stated at the hearing, it is the position of the Operating Engineers, Local 542, that the arbitrator in this proceeding is without jurisdiction to hear this "dispute". The arbitration clause of the existing agreement, Article VII, § 2 gives an arbitrator the power to decide disputes concerning the meaning and interpretations of various provisions within the agreement. Modifications, such as the elimination of the hiring hall are left strictly to the parties.

ARTICLE I—SECTION V

There is no dispute here as to the meaning or interpretation of any provision of the contract. There is not even a contention that Judge Higginbotham has declared the hiring hall to be illegal (pgs. 13, 28, 89 and 101 of the Opinion). What the employers really seek here is a major modification of this contract something that the parties have specifically reserved for themselves within the Collective Bargaining Agreement.

That modifications of the contract are not subject to ? ? ? ? ? ? ? ? *Manufacturing Corporation* 191 F. Supp 737 (Western District of Arkansas 1961) and *The Telephone Workers Union vs. New Jersey Bell Telephone* 584 F.2d 31 (3rd Cir.)

1970. It is the further position of the Union that this arbitrator is without jurisdiction to decide whether or not this dispute arguable. The arbitrate ability of a dispute under this agreement is within the sole jurisdiction of the Courts. See *Texoma Natural Gas Company vs. Oil Workers* IU 58 F. Supp. 132 (Northern District of Texas 1943) affirmed 146 F2d 62 (5th Circuit) 1943 Cert. denied 324 U.S. 872, 89 Lawyers Edition 1426, 65 Supreme Court 1017, Rehearing denied 325 U.S. 893, 89 Lawyers Edition, 2004, 65 Supreme Court 1183.

Furthermore, by bringing this action, the employers ask this arbitrator to usurp the jurisdiction of Judge Higginbotham in this matter which has been heard by him and is in the process of being decided by him. It must be noted that all parties were before Judge Higginbotham two weeks prior to this arbitration with proposed injunctive decrees in order to correct the situation that Judge Higginbotham said existed prior to the present union officials taken office. It would have been proper for the employers, at that time, to request that Judge Higginbotham suspend the hiring hull practice until such time as he rendered a final decision if, in fact, they were concerned about future liabilities. The past, present and future conduct of the union and the employers is solely and totally within the jurisdiction of Judge Higginbotham and his Court and for this arbitrator to attempt to rest that jurisdiction away from the United States District Court for the Eastern District of Pennsylvania is improper and without precedence. Judge Higginbotham certainly has the power in this action to issue whatever relief he deems necessary to protect all of the parties.

In fact, in their proposed injunctive decree, the employers have specifically requested the abolition of the hiring hall thereby completely and totally submitting this issue to Judge Higginbotham. They now come forward and ask the arbitrator to decide this case though he has no jurisdiction prior to a finding by Judge Higgin-

botham. It is quite clear that the ultimate decision on this particular issue is within the jurisdiction of the Federal Court and must be and can only be decided by them.

At this point, I will address myself very briefly to the merits of the employers' claim. The employers come before this arbitrator requesting a major modification of the Collective Bargaining Agreement. They present no evidence of any wrong doing on the part of the union or any violation of the contract. They merely present the opinion of Judge Higginbotham that prior to the present administration within the union, that there was, in fact, a discrimination in the operation of the hiring hall. There isn't before this arbitrator no evidence of present discrimination nor any evidence of any potential liability on the part of the employers. If the employers request that the arbitrator consider Judge Higginbotham's Opinion as evidence that it must follow that they must consider Judge Higginbotham's decision as binding and, again, I must state this, in fact, divests the arbitrator of any possible jurisdiction. I will not, at this stage, belabor the point which has been thoroughly argued before this arbitrator but merely requests that the arbitrator deny taking jurisdiction of this dispute and return it to the Federal Court where it belongs.

ADLER, BARISH, DANIELS, LEVIN
AND CRESKOFF

BY: /s/ Jack J. Berstein, Esquire
JACK J. BERNSTEIN, ESQUIRE
Attorney for Operating
Engineers Local 542

EXHIBIT B

AMERICAN ARBITRATION ASSOCIATION

Case No. 14 30 0309 79H

IN THE MATTER OF THE ARBITRATION

Between

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS,

—and—

OPERATING ENGINEERS EMPLOYERS OF EASTERN PENNSYLVANIA and DELAWARE

OPINION OF ARBITRATOR

This critical matter concerns the continued utilization by the affected employing contractors of Local 542's exclusive hiring hall referral system as set forth in Article II, Section 2, of the parties' collective bargaining agreement. Hearing was held in the Philadelphia offices of the American Arbitration Association on April 27, 1979. The law firm of Cunniff, Bray & McAleese, by John J. McAleese, Jr., and Thomas J. McGoldrick, appeared for the Operating Engineers Employers of Eastern Pennsylvania. The law firm of Apruzzese and McDermott, by Francis A. Mastro, appeared for the Delaware Contractors Association. The law firm of Adler, Barish, Daniels, Levin & Creskoff, by Jack J. Bernstein, appeared for Local 542. Following the hearing the parties filed memoranda.

The current agreement between the Operating Engineers Employers of Eastern Pennsylvania and Delaware (hereinafter referred to as "OEE") and Local 542 of the International Union of Operating Engineers, herein

referred to as "Local 542", covers a geographic jurisdiction encompassing 34 counties of Eastern Pennsylvania and Delaware and is effective from May 1, 1978, through and including April 30, 1981.

The agreement, in Article II, Pages 4 through 10, contains a detailed exclusive referral system controlled by Local 542 through which all employers must go in order to staff their work forces when in need of operating engineers. Article II, in Section I, "Non-discrimination", requires that:

> "No employee, or applicant for employment, shall be discriminated against by reason of race, religion, color, sex, age or national origin."

Article II, Section 2, "Hiring System", in (d) thereof, provides that:

> "The selection of applicants for referral to jobs shall be on a non-discriminatory basis. . ."

Article I, Section 2, "Legality", reads:

> "Should any of the terms or provisions of this Agreement be determined to be, *or held to be*, in contravention of *any applicable statute* or regulation enacted, promulgated or issued by any duly qualified governmental agency, any such term or provision shall be null and void, without thereby affecting any of the other terms or conditions hereof." (emphasis added)

On November 14, 1971, the Commonwealth of Pennsylvania and twelve black plaintiffs suing on their behalf as well as representative of a class of black operating engineers and would-be engineers, filed suit in the Federal District Court for the Eastern District of Pennsylvania. (Case No. C.A. 71-2698).

This suit alleged, inter alia, racial discrimination in admission in Local 542 as well as racial discrimination in denying access into the Local 542 exclusive hiring hall

system and subsequent work referrals through said exclusive referral system.

The defendant-Union is Local 542. Among other parties named as defendants in this case was a Philadelphia area contractor named Glasgow, Inc., which, by Court Order, was sued not only on its own behalf, but also as representative of approximately 1,400 other contractors. Like Glasgow, most, if not all, of these contractors are bound by exclusive hiring hall provisions identical to the one contained within the agreement between the employers and Local 542. (See 18 F.E.P. 1560 at 1564).*

Three contractor associations—the Contractors Association of Eastern Pennsylvania, the General Building Contractors Association, and the United Contractors Association—were also sued on their own behalf as well as class representatives of a defendant sub-class of Employer Associations who have collective bargaining agreements with Local 542 and which contained the above-described exclusive job referral system. Each of these three contractor associations are association members of OEE.

The evolution of the exclusive hiring hall referral system is as follows:

A. Prior to 1961 the employers, through various employer trade associations, had resisted efforts by Local 542 to establish an exclusive hiring hall system;

B. In contract negotiations in 1961 with Local 542, the Delaware Contractors Association finally acceeded to Local 542's demand for the inclusion of an exclusive hiring hall provision in their collective bargaining agreement;

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* Reference to 18 F.E.P. Cases at 1560 et seq. refers to the decision and opinion of Judge A. Leon Higginbotham who started this massive case in or about 1971 as a U.S. District Court Judge for the Eastern District of Pennsylvania and concluded it after he had been elevated to the United States Circuit Court of Appeals.

C. Shortly thereafter, Local 542, in 1961, demanded the inclusion of the exclusive hiring hall provision into its collective bargaining agreements with the Contractors Association of Eastern Pennsylvania (CAEP) and the General Building Contractors Association (GBCA). The CAEP and GBCA initially refused said demand. Local 542 then struck over this demand. A ten-week strike ensued. The CAEP and GBCA then agreed to Local 542's demand for an exclusive hiring hall system (18 F.E.P. 1560 at 1567).

The exclusive hiring hall referring system negotiated in 1961 is essentially the same one now embodying Article II, Section 2, of the agreement (18 F.E.P. 1560 at 1567).

On January 2, 1979, A. Leon Higginbotham, the Federal District Judge in C.A. 71-2698 issued a detailed Opinion incorporating his Findings of Fact and Conclusions of Law. That Opinion is reported at 18 F.E.P. Cases at Pages 1560 through 1632. In his January 2, 1979, Opinion, Judge Higginbotham who, during the course of trial in the above-captioned matter, had been elevated to the Third Circuit Court of Appeals, continued to sit as a Trial Judge in this case by special designation. He found that Local 542 had engaged in intentional racial discrimination in violation of Title VII of the Civil Rights Act of 1964 as well as 42 U.S.C. Section 1981 (Civil Rights Act of 1866).

As the Judge explained at 1569 of his Opinion, "The foundation of this case rests on statistical, documentary and testimonial evidence of discriminatory departures from and application of the union hiring hall."

In discussing plaintiff's evidence, Judge Higginbotham at Page 1615 stated:

> "If it were necessary to rely upon these (statistical) data alone, it may well be that plaintiffs' prima facie burden of intentional discrimination would be met. *But other proof offered by plaintiff and credited by*

this Court confirms in non-statistical ways the strong statistical inference of purposeful discrimination." (emphasis added)

Among this non-statistical proof was ". . . *discretionary and arbitrary referrals and the numerous instances of discriminatory actions against individual minority operating engineers."* (emphasis added) (18 F.E.P. 1560 at Page 1615).

In evaluating the statistical evidence presented at the trial the Judge, at Page 1600, adopted the analysis of plaintiffs' expert, Dr. Bernard Siskin, Association Professor at Temple University and Chairman of its Department of Statistics.

With respect to hours worked and money earned by minority operators, through the use of a regression analysis (so as to equalize factors of age, district, branch, seniority, and group out-of-work list status) Dr. Siskin concluded that whites on the average worked 97.5 hours more than minorities in 1972 and earned $749.00 more. For the period 1969-1971 Dr. Siskin found that by using a regression analysis white operating engineers on the average worked 109 hours more per year than minorities and on average earned $717.00 a year more than minorities. In crediting these conclusions, the Court, at Page 1589, stated:

> "It must be emphasized that the disparity in average hours worked are not a result of calculating the effect of low priority out-of-work list group or seniority. The discrepancies accrued while these factors were equal.

The Judge then declared:

> *'Closely tied to plaintiffs' proof of a differential in minority hours and wages is the proof of an arbitrary system of referrals."* (emphasis added)

In this regard, the Judge also credited Dr. Siskin's study of the District I referral system wherein Dr. Siskin performed an analysis of 17 out-of-work lists from among the various groups (five from Group I, one from Group II, five from Group I-A, and six oilers and RA lists). The Siskin study revealed that there was little correlation between ar individual's place on a specific out-of-work list and his actual referral. The Judge, at Page 1580-1581 concluded:

> ". . . it (the Siskin analysis) confirms that the out-of-work list ranking is simply not the principal basis for selection. *This corroborates plaintiffs claims of discrimination in the sense that it proves there is much room for arbitrary and standardless selections.* When combined with the other statistical disparities considering the rate factor directly, *this correlation study aids the inference of discrimination.* (emphasis added)"

As stated above, thep laintiffs also adduced testimonial evidence of discriminatory departure from and application of the union hiring hall. In this regard, the Court at pages 1590-1591 found:

> "The above individual narrations *reveal* in varying degrees *a pattern of delay or diversion either in acting upon or in entertaining minority application for hiring hall status as well as a pattern of neglecting to advise these minority applicants or would-be applicants of the availabe methods of entry.* Each of the above individuals had the requisite qualifications to obtain entry through at least one entry method. The resistance to entry of these individuals was not based upon a view that they lacked such qualifications. In most of the cases, years passed before any access was obtained, *and once registrant or other hiring hall status was achieved, the referrals to operating engineer jobs were few . . .*

> "*I find the above narrations credible in their description of resistance to equal minority opportunity through the hiring hall.* The testimony of Fox, Ahmad, Dent, Dukes, Iseley, Dodson, Hudson, Johnson, Benjamin, Roundtree, and Allen *persuade me that union officials acted deliberately to delay and resist applications, to fail to advise applicants of methods of entry and application procedures, and to fail in some instances to include on out-of-work lists those entitled to be listed* . . . This individual proof is not to be viewed out of the context of the other proof in this case and I repeat that its principal effect is to illustrate through individual instances how entry and participation of minority applicants (statistically and otherwise proven to have been intentionally discriminated against) was resisted by union officials. (emphasis added)"

Judge Higginbotham also discussed the contractors' role in the exclusive referral system set up under Article II, Section 2, of the Agreement. The Court, at page 1569, stated:

> "As a result of contracts entered into pursuant to negotiations with CAEP and GBCA in 1961 and subsequent negotiations with contractor associations, all participating contractors have passed on the direct managerial control of and application process to the hiring hall operated by Local 542."

In discussing the referral system, the Judge, at 1600, further declared:

> "The fact that referrals sometimes involved whites bypassing whites as well as blacks or some blacks bypassing some whites does nothing to contradict the overall disparities which plaintiffs' proof addressed and which has not been explained. *Indeed, this practice only confirms that the referral system was not bona fide in structure.*" (emphais added)

Furthermore, in analyzing the contractors' role in the Article II, Section 2, exclusive referral system, Judge Higginbotham at page 1617 of his Opinion held the following:

> "While we have found the union liable under Section 1981, a separate adjudication must be made as to whether the union's conduct in operating the hiring hall has caused the associations and contractors to be liable under that section.
>
> . . . . Yet I find that the plaintiffs have failed on a preponderance of the evidence that the associations or contractors viewed simply as a class were actually aware of the union discrimination affecting the employment of minority persons throughout the operating engineer industry in Local 542's jurisdiction. *Such knowledge with participation in the hiring hall system would of course itself constitute intentional discrimination. . . . Nevertheless, I find that the contractors and associations are injunctively liable* to the plaintiff class under Section 1981 *as a result of their contractual relationship to and use of a hiring hall system which in practice effectuated intentional discrimination*, whether or not the employers and associations knew or should have known." (emphasis added)

Pursuant to the directive of Judge Higginbotham, subsequent to January 2, 1979, Local 542 submitted a proposed injunctive decree * to conform to Judge Higgin-

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* It should be noted that in submitting its proposed injunctive decree, Local 542 advised Judge Higginbotham that it would not concede the correctness of any of his findings of facts or conclusions of law and reserved the right to contest those findings and conclusions, as well as any relief based thereon in further proceedings before Judge Higginbotham or before an appellate court.

It should also be noted that the employers represented by the grievant herein do not concede the correctness of Judge Higginbotham's findings or conclusions.

botham's findings of facts and conclusions of law contained in his Opinion, dated January 2, 1979. In its proposed injunctive decree, Local 542 has proposed to modify the specific provisions in Article II, Section 2 of the Agreement which set up the specific interworkings of the Local 542 exclusive hiring hall referral system. Notwithstanding this position, at the April 27 arbitration hearing, Local 542 did not request that any change be made in the existing hiring hall referral system as set forth in Article II, Section 2 of the Agreement, alleging that the arbitrator here is without jurisdiction to hear this dispute.

The underlying reason for Local 542's proposed changes in Article II, Section 2 is that the goal of attaining a situation whereby the average number of hours worked by minorities equals that worked by whites could not be achieved through implementation of the hiring hall provision as presently structured within the pertinent Agreement. Local 542's proposed modifications to the present provisions would include, inter alia, the creation of minority persons in each of the various priority groups (Group I, II, III, I-A, and apprentice) within the Local 542 hiring hall structure. (See Co. Ex. No. 3, paragraphs 16 and 17).

In addition, Local 542 has also proposed to further alter and amend the existing hiring hall referral structure by allowing the employer to hire minority operating engineers directly without utilizing the Agreement's exclusive hiring hall list in the event that Local 542 cannot satisfy an employer's request for a minority operating engineer. (See Co. Ex. No. 3, paragraph 14).

As a result of Judge Higginbotham's Opinion, dated January 2, 1979, John R. Smith, Jr., Secretary of the OEE, in a letter dated February 13, 1979, requested Local 542 to remove the existing exclusive hiring hall referral provisions, (Article II, Section 2), from the Agreement. Mr. Smith's written request was made di-

rectly to Mr. C. Joseph O'Donoghue, Business Manager of Local 542, and requested as follows:

> "As you are aware, in his decision issued on January 2, 1979, Judge Higginbotham concluded that the operation of the exclusive hiring system provided for in Sec. 2 of Art. II of the agreement between Local 542 and the Operating Engineers Employers of Eastern Pennsylvania & Delaware constitutes a violation of certain federal anti-discrimination laws. He suggests in his findings, conclusions and opinion, that individual employers, which may include employers represented by this association, under certain circumstances, may be liable for some injury caused by operation of that hiring system.
>
> "In order to remove any risk of liability relating to the hiring system, we do hereby request immediate removal from the agreement of Sec. 2 of Art.II
>
> "Please provide us with your response on or before February 21, 1979."

No such response was forthcoming. As a result, on February 23, 1979, Mr. Smith, on behalf of the OEE, informed Mr. O'Donoghue by telegram that in light of Judge Higginbotham's Opinion it was the position of the OEE that any employer covered by the Agreement between it and Local 542 did not have any obligation to comply with the exclusive hiring hall provisions set forth in Article II, Section 2 of the Agreement. In this telegram Mr. Smith also grieved the issue of continued compliance to Article II, Section 2 exclusive hiring hall referral provisions and requested arbitration of this dispute pursuant to Article VII, Section 2 of the Agreement. The telegram which was sent to Mr. O'Donoghue by Mr. Smith reads as follows:

> "Based at least in part upon the decision of Judge Higginbotham and the potential future liability which

may be imposed upon an employer who complies with Article II, Section 2 of the collective bargaining Agreement between Local Union 542 and the Operating Engineers Employers of Eastern Pennsylvania & Delaware, it is the position of the Operating Engineers Employers of Eastern Penna. & Delaware that any employer covered by that agreement does not have any obligation to comply with Article II, Section 2. "In view of this, we do hereby refer this matter to the grievance and arbitration procedure set forth in Article VII, Section 2 of the agreement.

"Therefore, pursuant to Article VII, Section 2, the Operating Engineers Employers of Eastern Pennsylvania and Delaware, hereby request that a meeting of the grievance committee be held at 1:00 PM on Saturady, February 24 in the offices of the Contractors Association of Eastern Pennsylvania."

Pursuant to Article VII, Section 2 of the Agreement, representatives of Local 542 and the OEE met to discuss the aforementioned grievance. At such meeting the parties deadlocked. Therefore the instant matter is before the Arbitrator.

Local 552, at the threshhold maintains that the Arbitrator in this proceeding is without jurisdiction to hear this "dispute" because it says the Arbitration clause only grants an arbitrator the power to decide dispute concerning the ". . . meanings and interpretations of various provisions within the Agreement. Modifications, such as the elimination of the hiring hall are left strictly to the parties."

The governing arbitral provision is found in Article VII, "Disputes and Grievances". Section 2, entitled, "Non-jurisdictional disputes and grievances", reads as follows, in pertinent part:

"All disputes and grievances of any kind or nature whatsoever arising under the terms and conditions

> of this Agreement, and all questions involving the interpretation of this Agreement. . ."

are arbitrable. Manifestly this is a broad arbitration clause for it conjunctively joins arbitrability of all disputes and grievances of any kind or nature whatsoever arising under the Agreement as well as all questions involving the interpretation of the Agreement. Accordingly, as I find that this matter constitutes manifestly a dispute or grievance which arises under the terms and conditions of the Agreement is is obviously arbitrable. Secondarily, Local 542 maintains that the Arbitrator has no right and no obligation to go beyond the four corners of the contract to explore, even when relevant to the issues before him, the impact of controlling law, statutory or judicial, on the contractual provision in question. I have rejected such a narrow interpretation in other cases where I felt adequate to the task of interpreting either controlling judicial precedent or statutory enactment. In this case I find that my competence is sufficient to move me forward. Furthermore, Article I, Section 2, "Legality" and Article II, Section 1, "Non-Discrimination", provides a firm basis for arbitral consideration of applicable judicial and statutory findings. Third, Local 542 maintains that the arbitrator is being asked to usurp the jurisdiction of the Federal Court and of Judge Higginbotham in this matter in that the proposed injunctive decrees are before him for adjudication. I do not so construe this matter because it arises under the collective bargaining agreement as to which the Arbitrator may be perfectly competent to rule, and indeed must be obliged to rule. Further, *whatever is awarded herein is manifestly subject to the pre-emptive review of any appropriate or applicable judicial authority*, here, that of Judge Higginbotham initially. The allegations of potential liability on the part of the employers and OEE, and of perhaps present discrimination are sufficient to require adjudication, if at all possible, in the arbitral process.

In the lawsuit giving rise to the instant grievance 19 months of trial were consumed; 17,000 pages of transcript were recorded; and approximately 100,000 pages of exhibits were made available. Judge Higginbotham specifically found, until and unless modified or reversed, inter alia, that Local 542 has engaged in intentional racial discrimination and hence has violated Title VII of the Civil Rights Act of 1964 and 42 U.S.C. Section 1981 (Civil Rights Act of 1966) by purposely:

1. Denying minority persons equal access to entrance into Local 542's referral system structured pursuant to Article II, Section 2 of the Agreement in question; and

2. Denying minority persons their rightful referrals from the various Group out-of-work lists set up under the exclusive referral system pursuant to Article II, Section 2.

In his Opinion at Page 1569 Judge Higginbotham has also declared that all participating contractors, in agreeing to the exclusive hiring hall system embodied in Article II, Section 2 of the Agreement, have passed on the direct managerial control of their employee application process to the hiring hall operated by Local 542. Because of this relationship, although Judge Higginbotham found that the plaintiffs had failed to prove that any employer and/or association had engaged in purposeful discrimination, he nonetheless found at 18 F.E.P. 1617 that they were "*injunctively liable* to the plaintiff class under Section 1981 as a result of their contractual relationship to and use of a hiring hall system which *in practice effectuated intentional discrimination whether or not the employers and associations knew or should have known*" that such racial discrimination was taking place within the contractually mandated collective bargaining agreement. (emphasis added)

In this regard, Judge Higginbotham also stated that a separate adjudication would have to be made as to whether the union's conduct in operating the hiring

hall has caused the associations and contractors to be liable under 42 U.S.C. Section 1981. Moreover, even more relevant and probatively significant to the instant grievance, Judge Higginbotham in his Opinion at page 1617 declared that "*Such knowledge* (on the part of the contractors and associations) *with actual participation in the hiring hall system would of course itself constitute intentional discrimination. . .*" by the contractors utilizing the Local 542 exclusive hiring hall referral system to staff their work forces. (emphasis added)

Judge Higginbotham in his Opinion dated January 2, 1979, also specifically found * that the racially discriminatory disparity in average hours worked and wages between whites and blacks utilizing the exclusive referral system *was closely tied* to the plaintiffs' proof of an arbitrary system of referrals from a referral system which was not bona fide in structure.* Therefore, the employers represented by the grievant herein, as well as all employers contractually bound to utilize Local 542's exclusive hiring hall referral system, *and certainly the Union*, are now placed in a most precarious and untenable position under the law because effective January 2, 1979 (through Judge Higginbotham's Opinion and Findings) they arguably now have knowledge or good reason to believe that the Article II, Section 2 exclusive referral system has been used as a vehicle by Local 542 to effectuate purposeful racial discrimination.

Premised upon the assumption that Judge Higginbotham's findings and conclusions with respect to Local 542's operation of the exclusive hiring hall referral system are legally correct,** if the contractors are forced to continue to perform their contractual bargain pursu-

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* After discussing and analyzing certain proof adduced by Local 542 in its attempt to rebut the plaintiffs' charges of racial discrimination in the operation of the exclusive hiring hall referral system, the Judge concluded: ". . . Indeed this practice only confirms that the referral system was not bona fide in structure." (18 F.E.P. at page 1600).

** This Arbitrator has no basis to assume or believe otherwise.

ant to Article II, Section 2, and therefore are forced to continue to utilize the Local 542 exclusive hiring hall with the knowledge, per Judge Higginbotham's Opinion, that said system is intentionally discriminatory, arbitrary and non-bona fide in structure, then said contractors would be forced to perform an act (i.e., request manpower referrals from exclusive hiring hall) the performance of which is illegal because said performance, per Judge Higginbotham, could constitute a direct intentional violation by them of Title VII and of 42 U.S.C. Section 1981 *and of the Agreement's specific non-discrimination clause* at Article II, Section 1 thereof. Therefore, this Arbitrator must conclude that the contractors are excused from performing their contractual bargain with Article II, Section 2 to utilize Local 542's exclusive referral system because continued use of adjudicially-found discriminatory referral system could be violative of certain civil rights laws *as well as the non-discrimination clause of the Agreement.* Article I, Section 2, "Legality", is binding in this context.

In rebuttal to the grievant's instant plea, Local 542 at the hearing argued that grievant proffered no post-January 2, 1979, evidence that Local 542 continues to engage in intentional racial discrimination. In this regard, it must be pointed out that Local 542 at the hearing failed to produce any evidence, either documentary or testimonial, that discrimination is not presently being practiced or perpetrated either in entrance into the exclusive referral system or in referrals to work sites off of the out-of-work lists. Moreover, given Judge Higginbotham's holding I must find that the grievant has established that continued performance of its members' contractual bargain to utilize Local 542's exclusive referral system is violative of certain civil rights laws and the Agreement's non-discrimination clause. Therefore, at the very least, the burden of coming forward to rebut grievant's assertions by a predonderance of the evidence has shifted to Local 542. Clearly, in light of the evidence adduced at the hearing before me, Local 542

has failed to meet this burden. Therefore, I must find for the grievant.

In addition, quite apart from the merits of the foregoing discussion, there exists a separate and distinct basis which warrants a finding that the employers represented by the grievant should be excused from performing in compliance with the exclusive hiring hall referral system as presently set forth in Article II, Section 2 of the Agreement.

As stated *supra.*, Judge Higginbotham on January 2, 1979, released a detailed Opinion, incorporating his findings of fact and conclusions of law in C.A. 71-2698. In his massive Opinion, Judge Higginbotham found that Local 542 has engaged in intentional racial discrimination against minority operating engineers and minority would-be operating engineers. He further held that such intentionally discriminatory conduct was violative of Title VII of the Civil Rights Act of 1964 and also was violative of 42 U.S.C. Section 1981 (the Civil Rights Act of 1866). In arriving at said conclusion, Judge Higginbotham, among other evidence adduced at trial, relied upon the disproportionate disparity in average earnings and hours worked between whites and minorities who utilized the exclusive hiring hall referral system. (18 F.E.P. at 1578, 1579, 1581).

Pursuant to Judge Higginbotham's request, all parties to C.A. 71-1698 submitted proposed decrees to conform to the findings and conclusions of the Court's January 2, 1979, Opinion. Local 542 submitted such a proposed decree. In its proposed decree Local 542, at pages 14 through 17, details a system of hearings aimed at providing retrospective relief to members of the plaintiff class.

In addition, in an attempt to assure prospective compliance with Title VII and 42 U.S.C. Section 1981, (See Proposed Decree, paragraph 36), Local 542, at pages 5 through 13, also details a schedule of prospective changes

in union membership requirements and hours goals as well as prospective substantive modifications to the referral system set forth in Article II, Section 2 of the Agreement. As pointed out *supra*, in its proposed injunctive decree Local 542 would itself change and alter the existing Article II, Section 2 contractual provisions to include, inter alia, the creation of a system of additional separate out-of-work lists composed only of minority persons in each of the various priority groups (Group I, II, III, I-A and Apprentice) within the present hiring hall structure. Briefly summarized, instead of utilizing the one list per group system presently set forth in Article II, Section 2, Local 542 is seeking to formulate a new two list system which itself is contrary to the dictates of Article II, Section 2.

Moreover, in its proposed decree, Local 542, in an attempt to assure equalization of average hours and assure future compliance with Title VII and 42 U.S.C. Section 1981, has also proposed a further alteration of and amendment to Article II, Section 2 of the Agreement. Unlike under the presently agreed upon language of Article II, Section 2, under this proposed amendment to said Agreement an employer under certain circumstances would be free to disavow his required utilization of the referral hall out-of-work lists and hire minorities directly off the street.*

As set forth in the preceding paragraphs, Local 542's proposed alteration of and amendment to the present Article II, Section 2 contractual language makes

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* Needless to say, under the present state of the yet unsettled law in this area, an employer who were to avail himself of such an option *conceivably* could be submerging himself into an inescapable quagmire of potential reverse discrimination claims under Title VII and 42 U.S.C. Section 1981 by whites on the out-of-work lists who were bypassed by the direct hire of minorities. (But cf. *United Steelworkers of America v. Weber*, —— U.S. ——, decided on June 27, 1979, which requires close and probing analysis in this regard).

abundantly clear to this Arbitrator Local 542's own realization that post-January 2, 1979, compliance with Title VII and 42 U.S.C. Section 1981 in terms of equalization of average wages and hours between minority and non-minority can never be achieved through the utilization of the Agreements *present* exclusive hiring hall language set forth in Article II, Section 2 thereof.

With this realization in mind and especially in view of the Agreement's specific non-discrimination mandate in Article II, Section I, this Arbitrator must sustain the grievance and deny Local 542's request that the present Article II, Section 2 language remain unchanged and continue in full force and effect.

The grievance filed by the Operating Engineers Employers of Eastern Pennsylvania and Delaware is hereby sustained.

In view of the specific non-discrimination mandate of Article II, Section 1 of the Agreement between the parties and in view of specific findings and conclusions of the Honorable A. Leon Higginbotham with respect to Local 542's racially discriminatory operation of the exclusive hiring hall referral system set up under Article II, Section 2 of the Agreement, I hereby find, under Article I, Section 1 of the Agreement, that the employers represented by the Operating Engineers Employers of Eastern Pennsylvania and Delaware are legally excused from performing in accord with any and all provisions of Article II, Section 2 of said Agreement, unless and until Judge Higginbotham is reversed or modified.

In addition, the essence of this matter requires, and I hereby retain jurisdiction over the instant grievance matter and any underlying issues for, among other things, imposition of any future remedies, either legal or equitable in nature, relating to the instant grievance matter and/or any underlying or collateral issues respecting the operation of the Local 542 exclusive hiring hall

system set forth in Article II, Section 2 of the Agreement.

/s/ Jay Kramer
JAY KRAMER, Arbitrator
Chairman Emeritus,
New York State Labor Relations Board

DATED: Great Neck, New York
July 10, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

ANSWER TO MOTION TO PRESERVE STATUS QUO

Defendants General Building Contractors Association, Inc., Contractors Association of Eastern Pennsylvania, and Glasgow, Inc., hereby request that this Court refuse to grant the Order preserving the *status quo* with respect to the exclusive hiring hall system, which Order was requested by Local 542, International Union of Operating Engineers in its "Motion to Preserve Status Quo." The reasons which militate against the issuance of such an Order are set forth in the attached supporting Memorandum.

[Signatures Omitted in Printing]

[Filed July 23, 1979]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

MEMORANDUM IN OPPOSITION TO MOTION TO PRESERVE STATUS QUO

I. FACTS

This Court in its January 2, 1979, opinion in this action concluded, *inter alia*, that the exclusive referral system or hiring hall contained in Article II, Section 2 of the collective bargaining agreement ("Agreement") currently in effect between the Operating Engineers Employers ("Employer") and Local 542 ("Union") was operated in a manner discriminatory to minorities. This Court further concluded that:

> *Such knowledge* [on the part of the contractors and associations that the operation of the hiring hall was discriminatory] *with actual participation in the hiring hall system would of course constitute intentional discrimination.* (emphasis added)

In light of this Court's conclusions as set forth above, and especially of the risk of potential liability of contractors as a result of their continued utilization of the Union's hiring hall, the Employers, on February 13, 1979, requested of the Union that Article II, Section 2, the exclusive referral system provision, be removed from the Agreement. (Appendix "A").

When the Union failed to agree to such removal, the Employers, on February 23, 1979, grieved the necessity of their continued use of the exclusive hiring hall. (Appendix "B"). This grievance was filed and processed in accordance with the final and binding grievance/arbitration provisions of the Agreement. (Appendix "C"). The Agreement calls for the utilization of the rules of the American Arbitration Association in the selection of an aribtrator. Thus, a list of seven candidates (Ap-

pendix "D") was submitted to both parties, and the Union and Employers alternatively struck one name until the remaining person on the list was designated the arbitrator. By this method, the parties selected Jay Kramer, Chairman Emeritus of the New York State Labor Relations Board and a labor arbitrator of national repute, to arbitrate this matter.

Arbitrator Kramer issued his opinion and award on July 10, 1979. In sustaining the Employers' grievance, he concluded that they are "legally excused" from utilizing the exclusive hiring hall contained within the Agreement. Thus, contractors who are parties to the Agreement do not have any duty or obligation stemming from the Agreement to utilize the Union's referral system, which referral system was held by this Court to have been operated in a discriminatory fashion.

In view of the statement by the Union on page 3 of its "Memorandum In Support Of Motion To Preserve Status Quo," it is clear that the Union is not contesting the validity of this final and binding arbitration decision.

Therefore, for the purpose of any decision on the Union's instant motion, there is not any support therefor in the Agreement. In point of fact, granting the motion would impose an obligation which is not contained in the Agreement and which is contrary to the Agreement.

II. ARGUMENT

Local 542 Has Not Demonstrated The Elements Necessary For This Court To Issue A Preliminary Injunction

The Union's request now at bar, however styled, is a request for a preliminary injunction. It seeks, according to the Union, to "preserve the status quo," and "the general purpose of a preliminary injunction is to preserve the status quo pending final determination of the action

after a full hearing." 7 Moore's Federal Practice, Para. 65 04[1]

Accordingly, the Union's request must be tested against the backdrop of the law controlling the issuance *vel non* of a preliminary injunction. That law requires that a petitioner establish that: (1) he is likely to prevail on the merits; (2) he will suffer irreparable harm if the injunction is not issued; (3) the damage to him, if the injunction is denied, plainly outweighs any foreseeable harm to the person against whom the requested injunction would operate; *and* (4) the balance of equities favors the issuance of the injunction. 7 Moore's Federal Practice, Para, 65.04[1]. In addition, *F.R.Civ.P.* 65(c) requires that a successful petitioner must provide security.

Since the Union has not satisfied—and cannot satisfy —any one of the four elements recited above as required before any preliminary injunction may issue, it plainly is not entitled to the injunction it seeks.

The Union cannot demonstrate that it is likely to prevail on the merits for the simple reason that it has advanced no legal basis for the relief that it has requested. The Union has merely asserted that if the Employers were to act in accordance with Arbitrator Kramer's award, its members might be harmed. It has not alleged any legal right which it possesses and upon which the Employers have infringed or might infringe in perpetrating this claimed harm. In short, in the present posture of the Union's request, there are no merits at all on which one can even argue whether or not the Union is likely to prevail.

Furthermore, the Union has not established that it will suffer irreparable harm if the Employers were to cease using the hiring hall. The Union's bare assertion that seniority expectations might be defeated "by unfettered action of the employers" plainly does not constitute a showing of irreparable harm. This bare assertion

also does not satisfy the third and fourth requirements as set forth above, and it is unnecessary further to elaborate on them.

As the foregoing argument demonstrates, the Union is not entitled to a preliminary injunction in this case. However, should this Court be disposed to grant such an injunction, the Employers insist that the Union comply with *F.R.Civ.P.* 65(c) and post security in an amount sufficient to protect the Employers against any liability which they might incur because of the continued operation of the condemned hiring hall system.

[Signatures Omitted in Printing]

[Appendices Omitted in Printing]

[Filed July 23, 1979]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

MEMORANDUM ORDER

Higginbotham, A. Leon, Jr., Circuit Judge

Defendant, Local 542, International Union of Operating Engineers (Local 542), has filed a "Motion to Preserve Status Quo" with respect to the exclusive hiring hall system. Specifically, Local 542 requests an order directing the defendant-employers to "observe the provisions of the current collective bargaining agreements relating to the hiring hall, pending issuance of the Court's final Remedial Decree in this case." Subject to certain modifications and additional obligations imposed upon Local 542, its motion will be granted.

Pursuant to arbitration provisions in the current collective bargaining agreement between the Operating Engineers Employers of Eastern Pennsylvania and the Delaware Contractors Association and Local 542, the parties participated in an arbitration proceeding before Mr. Jay Kramer, Arbitrator, Chairman Emeritus, New York State Labor Relations Board. The issue before him was whether a provision in Article 2 of the contract which establishes "a detailed exclusive referral system controlled by Local 542 through which all employers must go in order to staff their work forces when they need operating engineers," was no longer enforceable by reason of findings of fact and conclusions of law stated in my prior opinion on liability filed on November 10, 1978, and released on January 2, 1979, C.A. 71-2698.

The distinguished arbitrator stated that the employers were "legally excused from performing in accord with any and all provisions" pertaining to the exclusive re-

ferral system controlled by Local 542 "unless and until Judge Higginbotham is reversed or modified."

Regardless of whether the arbitrator's decision was appropriate on the limited record before him, it is obvious that he anticipated that I would take further action on this matter, and, in fact, he discussed various injunctive decrees that have been proposed by the parties. It is also obvious that he did not intend any ruling on his part to be incompatible with any subsequent decree of this court. Unfortunately, not attributable to the fault of anyone, a final injunctive decree has not yet been filed, though one will be filed in August. The parties are now in the midst of exploring settlement negotiations pursuant to a specific time-table whereby various offers and counter-offers are being made and conferences are being held. The parties will report to me on August 7 as to the status of these negotiations. If they have not agreed on a settlement by that date, I will file a decree in August pursuant to my prior findings of fact and conclusions of law.

During this interim period, prior to my filing a final decree, it would be inappropriate to make any modification of the contract that would perpetuate the past discrimination and statistical disparities or that would be basically inconsistent with the decree I plan to file. While I have found that the exclusive hiring hall as used and manipulated by Local 542, violated Title VII and 42 U.S.C. § 1981, I did not find that an exclusive hiring hall system was per se illegal. If in fact there is an abolition of the exclusive hiring hall, during this interim period, there is the possibility that the disparity in the employment of minorites (which disparity is attributable to past discrimination) will continue or be increased. Such results would be contrary to any decree which I contemplate filing.

Accordingly, during this interim period, I will grant order staying the effect of the arbitrator's decision, re-

quring Local 542 to assign minorities for referrals in proportion to the percentage of minorities of the population in each district in accordance with the data established in this case. Where actual referrals of minorities during the period between May 1, 1979 and July 20, 1979 have exceeded these percentages, Local 542 will be required to continue referrals at that rate.

Accordingly, the various districts should, until August 31, 1979, assign minorities from their worklists in accordance with the following percentages:

District 1	17.3%
District 2	1.8%
District 3	1.8%
District 4	2.9%
District 5	12.1%[1]

BY THE COURT:

/s/ A Leon Higginbotham
Circuit Judge *

Dated:

[Filed July 25, 1979]

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* United States Court of Appeals Judge Sitting by Designation.

[1] Local 542, in reporting the number of minorities referred in District 5, stated, "[A]ll of the minorities are working." Letter of July 24, 1979 from Local 542 to the court. Although the meaning of this phrase is ambiguous, if all minority engineers available for work have been assigned to jobs, obviously nothing more is required.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

ORDER

AND NOW, this 25th day of July, 1979, upon consideration of the "Motion to Preserve Status Quo" filed by Local 542, it is hereby ORDERED that defendant employers continue to adhere to the hiring hall provisions of their collective bargaining agreement with Local 542 until August 31, 1979. It is further ORDERED that, during this period, minority operating engineers receive the following percentage of referrals by Local 542:

District 1	—	17.3%
District 2	—	1.8%
District 3	—	1.8%
District 4	—	2.9%
District 5	—	12.1%

By the Court:

/s/ A. Leon Higginbotham
Circuit Judge
Sitting by designation

[Judgment and Decree of the District Court, August 8, 1979 (502 F. Supp. 7) are reprinted at pp. 226-245 of the Appendix to Petition for Certiorari in No. 81-280. Post Decree Orders Nos. 2, 3, 10, 13, 14 and 15 are reprinted at pp. 246-268 of the Petition for Certiorari in No. 81-280. Post Decree Orders Nos. 1-21 are reprinted at pp. A255-A355 of the Appendix to Petitions for Certiorari in Nos. 81-330/333.]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-2698

[Title Omited in Printing]

JUDGMENT AND DECREE *

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* HIGGINBOTHAM, A. L., C. J.; United States Circuit Judge sitting by designation, as amended by Bechtle, L., United States District Judge.

I. DEFINITIONS

1. As used herein, unless the context clearly requires a different meaning, the term "defendants" shall refer to the following:

(a) Local 542, International Union of Operating Engineers (Local 542);

(b) Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania and Delaware (JATC);

(c) Contractors Association of Eastern Pennsylvania (CAEP), General Building Contractors Association, Inc. (GBCA), United Contractors Associaton (UCS), Pennsylvania Excavating Contractors Association (PECA), and all other employer associations who have been parties to a collective bargaining agreement with Local 542 at any time between November 8, 1965 and the date of this Decree; and,

(d) Glasgow, Inc., and all other employers who have been parties to a collective bargaining agreement with Local 542 and who hired at least one operating engineer affiliated with Local 542 at any time between November 8, 1965, and the date of this Decree.

2. As used herein, the term "collective bargaining agreement" shall mean the labor agreement currently in effect between Local 542 and participating contractors and contractors associations or, where the context so requires, a subsequent version of that agreement.

3. The effective dates of the Decree shall, unless otherwise ordered by the Court, cover and include the following five-year period:

1st year:	September 1, 1980-August 31, 1981
2nd year:	September 1, 1981-August 31, 1982
3rd year:	September 1, 1982-August 31, 1983
4th year:	September 1, 1983-August 31, 1984
5th year:	September 1, 1984-August 31, 1985

4. (a) As used herein, the term "minority" or "minorities" shall include Blacks, Spanish-surnamed Americans, Asians, and American Indians.

(b) As used herein, the term "percentage of minorities in the community" or similar terms refer to the percentage of minority males between the ages of 18 and 65 in the population. The percentage of minorities in the community for each district is set forth in paragraph 16.

II. PERMANENT INJUNCTION

5. Defendants shall not discriminate against any minority person because of his color or national origin, with respect to acquisition, retention of membership or affiliation in said local union, with respect to referral and selection for employment, with respect to any training, retraining or upgrading programs, or with respect to any other terms and conditions of employment, union membership or affiliation.

6. No person shall be retaliated or discriminated against by any of the defendants, their agents, officers, employees or their successors in office, because that person has opposed any practice of defendants challenged in this lawsuit, because that person is a member of the class represented by plaintiffs or because that person has made a charge, testified, assisted or participated in any manner in any stage of the investigation, proceeding or hearing of this case.

7. Moreover, it shall be a violation of this Judgment and Decree for any defendant to deny, deprive, or attempt to deny or deprive, any individual member of the plaintiff class of a right or benefit to which he is entitled by the terms and provisions of the Judgment and Decree. It is the Court's specific purpose and intent in entering this order that all members of the plaintiff class shall share and participate equally, to the maximum extent possible, in the class-wide employment opportunities

and rights created herein. It shall be a violation of the Decree, therefore, for any defendant to single out particular plaintiff class members for the purpose of denying them any relief herein to which they are entitled.

8. Further, a strike, work-stoppage or work slowdown by any officers, agents, members or affiliates of Local 542, or by any persons acting in concert with any officers, agents, members or affiliates of Local 542, which has as its purpose the interference with the operation of this Decree, shall constitute a violation of this Decree. Local 542 is obligated to make a good faith effort to prevent or end any such violations. Such a violation shall subject Local 542, its officers, agents, members and affiliates participating in the strike, work-stoppage or work slowdown to the contempt power of the Court. This clause shall operate regardless of whether the strike, workstoppage or work slowdown is authorized by Local 542. However, nothing in this Decree shall prohibit a strike, workstoppage or work slowdown by Local 542, its officers, agents, members or affiliates, the purpose of which is other than the interference with or the thwarting of the operation of this Decree.

III. MASTER

9. Pursuant to Rule 53 of the Federal Rules of Civil Procedure, the Court shall designate a Master to have primary responsibility for overseeing the implementation of this Decree.

10. (a) Except for any matter expressly required by this Decree to be presented directly to the Court, any disputes among the parties regarding the interpretation or implementation of this Decree shall be presented in the first instance to the Master. No party shall present any dispute to the Master unless the party has first notified the other affected parties and made a good faith effort to resolve the matter by agreement. Unless the Decree or an order of this Court specifies a different period,

any party may appeal any decision of the Master under this Decree, including any decision made pursuant to this paragraph, by filing a request for review with this Court within ten (10) days of such decision. Delays beyond this ten day period shall be allowed upon a showing of good cause.

(b) In addition to the powers specified in this Judgment and Decree, the Master shall be empowered to take all actions, including the establishment of such record-keeping requirements, as may be deemed necessary to implement and insure strict compliance with the terms and provisions of this Decree. The Master shall hear and determine all complaints concerning the operation of this Judgment and Decree and shall decide any questions of interpretation, claims of violations, and questions of remedies that may be necessary and appropriate. The Master shall act either on his own initiative or at the request of any interested person or party. All decisions of the Master shall be either in writing or dictated to a court reporter who shall prepare a transcript of such decisions.

Nothing contained herin shall give the Master the right to amend or modify the substantive terms and provisions of this Judgment and Decree, other than as specifically granted, nor shall the Master have any power and authority other than that granted to him in this Judgment and Decree. Any request for modification of this Decree or any of its provisions, other than those modifications that the Master is specifically empowered to make, shall be submitted directly to the Court. The Master shall have the power to suggest modifications or amendments of this Judgment and Decree.

11. The Master shall have the assistance of an eight-member Advisory Committee, four members of which shall be selected by the Plaintiffs and four by the Defendants.

IV. GOALS

12. It shall be the goal of this Decree that the number of hours worked by minorities equal the percentages of the total hours worked in each district and in each year as is set out below:

	1st year	2nd year	3rd year	4th year	5th year
District 1	12%	14%	16%	18%	18%
District 2	1.1%	1.3%	1.3%	1.3%	1.3%
District 3	.5%	.7%	.7%	.7%	.7%
District 4	2%	2.6%	2.8%	2.8%	2.8%
District 5	3%	10%	12%	12.4%	12.4%

The Court may alter these goals on the basis of the 1980 United States Census or as provided in paragraphs 29 and 44. It shall also be the goal of this Decree to ensure in each year that in each category of union membership or affiliation (including group I, group I-A, group II, and group III membership in the parent body of Local 542, and membership in C Branch and in the Apprenticeship Program) in each district, except to the extent that differentials can be shown to be justified by nondiscriminatory factors, the average number of hours worked by minorities equals that worked by whites. To facilitate the Achievement of these results, the defendant employers and Local 542 shall have the specific obligations set forth in the succeeding paragraphs.

13. In calculating the number of hours worked by minorities, only the first 50 hours worked by an individual minority operating engineer in any week will be counted unless it is shown that any hours worked in excess of 50 *are not* the result of an attempt to distort the reporting statistics.

V. UNION OBLIGATIONS

14. (a) Except as authorized by this Decree, Local 542 shall make all referrals in accordance with the procedures set forth in the collective bargaining agreement.

(b) In addition to the regular out-of-work lists contemplated by the collective bargaining agreement, Local 542 shall maintain out-of-work lists composed only of minority persons, divided into priority groups in accordance with the collective bargaining agreement.

(c) Local 542 is authorized to make referrals directly from the minority out-of-work lists in response to employer requests for minority employees made pursuant to paragraph 27 or at its own initiative pursuant to paragraph 15.

15. The percentage of minorities referred by Local 542 must at least equal those set forth in paragraph 12. If, at the end of the first year (as defined in paragraph 3, the goal for minorities' hours set forth in paragraph 12 has not been met in any district, the Master may increase the minimum rate at which minorities must be referred.

16. Local 542 shall admit into its total membership and affiliation at least one minority for every one available non-minority admitted during the first two (2) years this decree is in effect. Thereafter, Local 542 shall admit at least one minority for every two non-minorities admitted. This ratio shall be followed until the racial composition of Local 542 and of its five districts reach the minority percentage in the community for each of the five districts and the union as a whole; provided, however, once a particular district attains its appropriate minority percentage (for example, 18% for District 1) this one-for-one ratio shall no longer be applied in that district. Those percentage-goals are set forth below:

District I	18.0%
District II	1.3%
District III	.7
District IV	2.8
District V	12.4

These goals may require reassessment after the release of the 1980 United States Census. Therefore, the

Court may increase or decrease these percentage goals, as the case may be, either on its own motion or upon request by any party.

17. The procedures and criteria for each method of entry as a member of the parent body of Local 542 or as a registrant with Local 542 shall be set forth in a notice, which shall be posted in a conspicuous location in the hiring hall of each district of Local 542 and in the offices of each defendant employer. Local 542 shall also make the notice readily available to its members and affiliates and any interested members of the public. The parties shall attempt to agree on the contents of the notice; if they are unable to agree, the matter shall be presented to the Master. Local 542 shall apply all procedures and criteria for each method of entry on a nondiscriminatory basis.

18. Defendant Local 542 shall admit at least one minority for every one non-minority through the following methods of entry:

New C Branch hires and new entrants to the Registrant Program. This ratio shall remain in effect until the racial composition of Local 542 and of its five districts reach the percentage-goals set forth in paragraph 16 and that percentage is maintained for 2 years; provided, however, once a particular district has attained its appropriate minority percentage and maintains it for two years, this one-for-one ratio shall no longer be applied in that district.

The mandatory one-for-one entry requirement shall not apply to Organization (the Union's organization of new employers) because of its unique characteristics. However, Local 542 shall make the maximum effort possible to meet the one-for-one entry requirement under Organization. The failure to meet the one-for-one requirement via Organization shall not relieve Local 542 of its overall obligation to admit one minority for every one

non-minority until the percentage-goals set forth in paragraph 16 are met.

19. Any new methods of entry which Local 542 may develop and wish to utilize must first be submitted to Plaintiffs for their comment and thereafter to the Court for approval. The one-for-one entry requirement set forth in paragraph 16 may apply to any new method of entry if the Court deems its application to be appropriate.

20. In paragraph 27, the responsibilities of each defendant class employer with regard to the number of hours to be worked by minority operating engineers are detailed. Under the circumstances described there, each contractor-employer is permitted to hire minorities not currently affiliated with Local 542 in order to reach its minority utilization goal. Minorities hired and employed in compliance with paragraph 27 shall be required to become affiliated with Local 542. Minorities entering the operating engineers industry through this direct entry method shall be counted towards the attainment of the minority composition goals for the union as a whole and for each of its five districts as set forth in paragraph 16.

21. (a) Defendant Local 542 shall develop and present to the Court for approval valid, job-related criteria for admission to the union for each method of entry through which membership can be attained, including affiliation via the Registrant Program. Validation shall be, to the extent feasible, in accordance with the "Uniform Guidelines on Employee Selection Procedures" as promulgated by the Equal Employment Opportunity Commission on August 25, 1978, 43 Fed. Reg. No. 166, at 38290 *et seq.* The Plaintiffs shall have the opportunity to present their position on the legality and validity of any of these proposed criteria.

(b) If the Court approves the proposed union membership and registrant criteria, they may be put into

effect; provided, however, that the approval of new membership and registrant criteria, if any, shall not relieve Local 542 of its obligations under paragraph 16 of this Decree.

22. Pending the development and approval of new membership requirements, Local 542 may continue to use its existing requirements for each of its present methods of entry.

23. All minority graduates of Operations Benjamin Franklin I and II who are not members of Local 542 as of the date of this decree shall be offered Registrant books unless good cause is shown for the failure to do so and such minority graduates shall be offered admission into the parent body of Local 542 after they have worked 1500 hours during their affiliation with Local 542. They may be charged an initiation fee only if they have not previously made such a payment. However, if a fee is required, deferred payments shall be permitted in an amount to be determined by the Master.

24. All mionrity graduates of Operations Benjamin Franklin I and II who are not members of Local 542 as of the date of this decree shall be offered the opportunity for intensive training and retraining as operating engineers. Minority graduates of these programs who have attained union membership may take part in this training if they choose to do so. The training itself may take the form of comprehensive on-the-job training or participation in the Special Training Program set forth in paragraph 41 of this Decree, or both. All aspects and components of training shall be developed by the Master with the assistance of the Advisory Committee. The costs of this program shall be borne by the Defendants.

25. Not all minority graduates of Operations Benjamin Franklin I and II who have not yet attained union membership are required to undergo the training identified in paragraph 24. Minorities in this group who are sufficiently skilled as operating engineers need not

participate in training. The decision as to whether a particular graduate is sufficiently skilled is reserved to the Master with the assistance of the Advisory Committee.

26. In order to remedy the past racial discrimination with respect to transfers in and out of C Branch, Local 542 shall personally notify all present and future C Branch minority members of their right to apply for and be transferred out of the C Branch and into the parent body of the Union. No more stringent requirements for transfer shall be imposed on present C Branch minorities than have been imposed by Local 542 in the past on whites.

In addition, Local 542 shall personally notify all present parent body minorities of their right to apply for transfer into the C Branch. No more stringent requirements for transfer in this regard shall be imposed on these minorities than have been imposed by Local 542 in the past on whites.

VI. EMPLOYER OBLIGATIONS

27. In order to achieve the minority hour-utilization percentage goals set forth in ¶ 12, each defendant contractor-employer shall hire minority operating engineers in the following manner:

(a) First, each contractor-employer shall hire and employ minority operating engineers who are or become members, apprentices, registrants or affiliates of Local 542 and who are referred by Local 542 through its hiring hall. If any particular contractor-employer is not separately meeting the applicable minority hour-utilization percentage goals set forth in ¶ 12 in its own aggregate work force in the district (*e.g.*, 12% for the first year in District I), it may request additional minority referrals from the Local 542 hiring hall.

(b) Second, if the current monthly hourly reports of responding contractor-employers in the reporting district,

as officially compiled and certified by the Reporting Committee, show: (i) that the minority hour-utilization percentage goals of ¶ 12 have been met for the Decree year-to-last-reporting-date on a district-wide basis by all reporting contractors in that district as a whole; and, (ii) that for the year-to-last-reporting-date 50% or more of the reporting individual contractor employers in the district have separately met or exceeded the minority hour-utilization percentage goals of ¶ 12 in their own work forces in that district, then, and only then, may the contractor-employer who is not separately meeting the minority hour-utilization percentage goals in its own aggregate work force in that district withdraw its request for additional minority operating engineer referrals from the Local 542 hiring hall. However, such contractor-employer may only make such a withdrawal during such time as both conditions (i) and (ii) above are being met from the Decree year-to-last-reporting-date. Any contractor-employer who is not separately meeting the minority hour-utilization percentage goals of ¶ 12 Decree year-to-last-reporting-date in its own aggregate work force in the district may insist upon additional minority referrals from Local 542, regardless of whether the district as a whole and/or 50% of the contractor-employers have met or exceeded the minority hour-utilization percentage goals of ¶ 12. Any contractor-employer may only insist upon additional minority referrals until such time as Reporting Committee certified information indicates that the contractor-employer has separately achieved the minority hour-utilization pecentage goals under ¶ 12 in its own aggregate work force in the district in question. Once that individual minority percentage goal is certified by the Reporting Committee to have been achieved Decree year-to-last-reporting-date, the contractor-employer may not request additional minority referrals until such time as certified by the Reporting Committee, as its own individual minority hour-utilization percentage in its own work force is less than the percentage goals set forth in ¶ 12 of the Judgment and Decree.

(c) Third, if: (i) the contractor-employer has not withdrawn its request for additional minority referrals as provided above; (ii) if it has not yet individually reached in its own aggregate work force in the district the minority hour-utilization percentage goals set forth in ¶ 12; and, (iii) if it cannot obtain sufficient minority referrals from the Local 542 hiring hall, then, to enable it to separately meet the minority hour-utilization percentage goals in its own aggregate work force in the district, the contractor-employer is permitted to hire and employ skilled minority operating engineers who are not currently affiliated with defendant Local 542. Registrant books shall promptly be provided to these minorities by the Union. Thereafter, each such minority shall become eligible for parent body membership in accordance with the relevant terms of the collective bargaining agreement and the Union's by-laws. The wages, compensation and all terms and conditions of employment for this group of minorities are to be determined by the relevant collective bargaining agreement.

(d) If *all* the conditions set forth in subparagraph (c) above have been satisfied, and the contractor-employer still has not been able to separately satisfy the minority hour-utilization percentage goals set forth in ¶ 12 in its own aggregate work force in the district, then the contractor-employer is permitted to hire and employ minorities who are not currently skilled as operating engineers, and not currently affiliated with Local 542. On-the-job training and instruction shall be provided to this category of minorities so that they are able, to the maximum extent feasible, to learn and become skilled in the operation of equipemnt used and the work performed by operating engineers. The Union shall promptly provide each minority person hired pursuant to this provision with a Registrant book. Thereafter, each such minority shall become eligible for parent body membership in accordance with the relevant terms of the collective bargaining agreement and the Union's by-laws.

The wages, compensation and all terms and conditions of employment for this group of minorities shall be determined by the relevant collective bargaining agreement.

(e) Notwithstanding any other provision of this Judgment and Decree, no defendant contractor-employer shall be held liable for the non-attainment of the applicable minority hour-utilization percentage goals set forth in ¶ 12 if: (i) the minority utilization goal has been met for the Decree year-to-last-reporting-date on a district-wide basis by all contractor-employers as a whole; and, (ii) for the Decree year-to-last-reporting-date 50% or more of the contractor-employers in the district have been certified to have met or exceeded the minority hour-utilization percentage goals in their own fork forces in the district.

(f) At the conclusion of each Decree year, if either condition (i) or (ii) set forth in subparagraph (e) above has not been satisfied, then, except for the exemptions from liability specified below, all defendant contractor-employers who performed work in the non-complying district for any part of the Decree year shall be held jointly and severally liable for the non-attainment of the applicable minority hour-utilization percentage goals set forth in ¶ 12 of the Judgment and Decree. A contractor-employer shall be deemed exempt from any liability for non-attainment of the applicable minority hour-utilization percentage goals in a district only if: (i) it has separately attained the minority hour-utilization percentage goals of ¶ 12 in its own aggregate work force in the district in question for the Decree year, as indicated by certified information of the Reporting Committee; or, (ii) good cause can be shown to justify that party's noncompliance.

(g) No defendant contractor-employer shall be held in violation of this Judgment and Decree on account of any withdrawal of a request for additional minority referrals, or failure to individually achieve the minority hour-

utilization percentage goals at the end of the Decree year, which were made upon proven reliance of official Decree year-to-last-reporting-date information provided to it by the Reporting Committee, the Master or the Court concerning district-wide compliance, individual compliance by other contractor-employers or its own individual compliance. A contractor-employer shall not be excused from liability for noncompliance if it relies upon compliance information from any other source except the above.

(h) The knowing or willful submission of erroneous data by any party or person to the Reporting Committee shall be deemed to be disobedience to the Court's Decree and shall subject the responsible party to the contempt power of the Court.

(i) Any questions, disputes or problems between or by any party concerning any aspect of the provisions of this paragraph shall be presented in the first instance, after notice to the other party, to the Master for his prompt determination and decision, in conformance with the other provisions of the Judgment and Decree.

(j) The Master is specifically empowered to monitor compliance with the provisions of this paragraph and shall take any remedial action necessary to implement and insure strict compliance with the terms and provisions of this paragraph and, in general, this Decree.

28. In meeting its responsibilities, as set forth in paragraph 27, no contractor-employer shall be required to hire, or continue the employment of, any minority if just cause exists not to hire, train or employ him. The phrase "just cause" as used herein shall be given the same meaning and interpretation as it is given in the collective bargaining agreement (see, *e.g.*, p-281-B. at 2. Article II, Section 2(c)). In addition, no contractor-employer shall be held liable for the non-attainment of its minority utilization goal because of a volun-

tary termination by a minority operating engineer that is without just cause, or because of the unavailability of a minority operating engineer due to illness, incarceration or the like. Furthermore, the refusal of a referral without just cause by a minority operating engineer on three consecutive occasions shall be a defense assertable by a contractor-employer to the non-attainment of its minority utilization goals.

29. The minority utilization goals set forth in paragraph 12 and the means for achieving them as set forth in paragraph 27 shall apply to each non-C Branch contractor-employer in each of Local 542's five districts. The Master shall audit each employer's minority utilization of operating engineers on a quarterly basis.

The burden of proving a valid reason for not achieving the appropriate minority utilization percentage rests on each non complying contractor-employer. In order to successfully discharge its burden, each non-complying contractor-employer, if any, must prove that it utilized or attempted to utilize the means for achieving the appropriate minority utilization goal as set forth in paragraph 27. The Master shall determine whether a noncomplying contractor-employer has discharged its burden and what remedial action, if any, should be imposed in accordance with the procedures set forth in paragraph 44.

30. (a) Hiring for C Branch shall continue to be conducted directly by the defendant employers.

(b) Each C Branch employer shall have the responsibility of guaranteeing that all of its new C Branch employees are hired on a one minority for one nonminority basis until the percentage of minorities in its operating engineer labor force is at least equal to the percentage of minorities in the District(s) of Local 542 in which it is located as set forth in paragraph 16.

(c) Except where justified by nondiscriminatory factors, each employer in each district shall employ mi-

nority and white C Branch employees for the same average number of hours per employee.

(d) Any allegations of noncompliance with the provisions of this paragraph shall be resolved according to the procedures set forth in paragraph 44.

VII. APPRENTICESHIP PROGRAM

31. Defendant employers and Local 542 shall continue to administer an apprenticeship program through the JATC.

32. Defendant JATC shall admit into its apprenticeship program at least one minority for every one non-minority apprentice in each new apprenticeship class. This ratio shall be followed until the racial composition of Local 542 as a whole and of its five districts reach the minority percentage goals set forth in paragraph 16; provided, however, once a particular district attains its appropriate minority percentage, this one-for-one ratio shall no longer be applied in that district. The terms and provisions of this paragraph shall apply to any apprenticeship class beginning after the date of this Decree.

33. JATC may continue to utilize the present JATC test and oral interview, and thereafter rank eligible applicants in order of their scores on that test and interview. Should JATC desire to adopt and utilize other or additional criteria and standards, it must submit these criteria and standards to plaintiffs for comment and subsequently to the Court for approval; provided, however, that no JATC class shall be cancelled or postponed pending the adoption and/or implementation of any additional criteria or standards; and provided further, that regardless of which standards and criteria are utilized, the one-for-one admission requirement, as set forth in paragraph 32, shall remain in effect until such time as the percentage goals set forth in paragraph 16 are met.

34. In order to meet the one-for-one ratio set forth in paragraph 32 and the percentage-goals set forth in paragraph 16, JATC shall affirmatively recruit minority applicants for the apprenticeship program in each of Local 542's five districts and JATC shall continue to use the recruitment, tutoring and counselling services of the Joint Apprenticeship Outreach Program and any other agency that is capable of assisting JATC in minority recruitment.

35. Any minority member of the apprenticeship program whose progress is unsatisfactory shall be notified by the JATC in writing of the problem and the reasons therefor. If he does not show adequate improvement within thirty (30) days afer the initial notice of deficiency, he shall be notified in writing to appear before the JATC and shall be offered the opportunity to participate in a special remedial program. If adequate improvement does not occur within sixty (60) days after his requested appearance before the JATC, he may be discharged from the apprenticeship program. Any person discharged from the apprenticeship program pursuant to this paragraph may appeal his discharge to the Master within seven (7) days after he receives written notice of his discharge and his right to appeal.

36. Upon graduation from the apprenticeship program, an apprentice shall be accorded Group I journeyman status in Local 542 as provided by the collective bargaining agreement.

37. Prior to selecting the members of each apprentice class, the JATC shall take reasonable steps to publicize the class, including advertisements in the help-wanted sections of newspapers or periodicals oriented toward the minority community.

38. In order to remedy the past racial discrimination with respect to the position of JATC instructor, defendant JATC shall appoint one minority for each one non-

minority to all future JATC instructor positions, and shall continue to apply that ratio until such time as 11.5 percent (the percentage of minorities in community in Local 542's jurisdiction) of all JATC instructor positions are held by minorities. The qualifications for JATC instructor shall in no respect be any more stringent than those previously applied by the JATC.

VIII. MASTER MECHANICS

39. In District I of Local 542, at least one out of every eight new master and assistant master mechanic appointments shall be to minority parent body members.

In Districts II, III, IV and V, minority parent body members shall be appointed to master and assistant master mechanic positions in a percentage equivalent to the minority representation in the community for those districts (i.e., 1.3% in District II; .7% in District III, 2.8% in District IV, and 12.4% in District V).

The requirements for the hiring of master and assistant mechanics shall be reassessed after two years.

40. The Defendants shall develop, adopt and implement non-discriminatory and job-related standards for the positions of master and assistant master mechanics. Once developed, these standards shall be submitted to the Court for approval, with prior submission to Plaintiffs for their comments, or objections, if any.

40(a). In order to assure compliance with the requirements of paragraph 39 above, Local 542 is required to keep an ongoing list of master and assistant master mechanic appointments in each of its five Districts referral halls. In addition, each contractor-employer who appoints Local 542 members as master and assistant master mechanics shall keep a list of its own regarding these appointments. Said lists shall include the appointee's name, race, date and length of appointment, name of the employer and location of jobsite. Local 542 shall immediately provide a copy of the current list of appointments

to any contractor association or contractor who makes request for said list.

40(b). Local 542 and those contractor-employers making appointments of master and assistant master mechanics shall submit a quarterly report to the Master, the Reporting Committee and a representative designated by plaintiffs, setting forth sufficient information regarding appointments to the positions of master and assistant master mechanic for the previous quarter and the year-to-date to permit a determination of whether the ratios and goals set forth in paragraph 39 are being achieved.

40(c). Any dispute between a contractor, Local 542, or the plaintiffs as to the requisite race of a prospective master or assistant master mechanic appointment shall be submitted immediately in writing to the Master for resolution which the Master shall use his best efforts to determine within seven (7) days of the date the Master receives all of the information he deems necessary in order to render a decision.

IX. RETRAINING AND UPGRADING

41. In light of the Court's findings of intentional discrimination against minority operating engineers with respect to referrals, hours worked, wages, and with respect to the exclusion of minorities from Operation Stepping Stone, the Defendants shall conduct a retraining and upgrading program, the purpose of which is to improve the skills, where necessary, of minority members and registrants of Local 542. All active minority members and registrants shall be personally notified of the program and personally offered an opportunity to participate. The program shall be developed by the Master with the assistance of the Advisory Committee.

42. This training program shall not, however, be limited to training at a training site, but shall also include on-the-job training on new equipment or equipment currently in use in the operating engineers industry. The

expenses of the program shall be borne by the Defendants.

X. RECORDKEEPING AND REPORTING

43. (a) During the life of this Decree each defendant shall maintain sufficient records to enable it to comply with the reporting requirements of this paragraph and to allow the Master or the Court to determine the adequacy of its compliance with this Decree.

(b) To facilitate the compilation of data and the filing of reports, the defendants shall establish and maintain a Reporting Committee, which shall consist of one person designated by Local 542 and one person designated by the defendant employers.

(c) Each defendant employer shall submit to the Master, the Reporting Committee and a representative designated by plaintiffs a monthly report setting forth sufficient information regarding operating engineer hours for the previous month and the year-to-date to permit a determination of whether the employer is in compliance with its obligations under ¶¶ 27 and 30.

In addition, each defendant employer shall submit to the Master, the Reporting Committee and a representative designated by plaintiffs a quarterly report setting forth sufficient information regarding the earnings of minority and non-minority operating engineers for the previous quarter and year-to-date to permit a determination of whether there has been compliance with the nondiscrimination provisions of ¶ 5 of the Judgment and the Decree.

(d) Based on the monthly reports submitted by employers pursuant to subparagraph (c), the Reporting Committee shall submit to the Master, Local 542 and a representative designated by plaintiffs a monthly report setting forth sufficient information regarding operating engineer hours for the previous month and the year-to-

date to permit a determination of whether the overall hours goals set in ¶ 12 are being met.

Similarly, the Reporting Committee shall, on the basis of the earnings data submitted quarterly by employers pursuant to subparagraph (c), supra, submit to the Master, Local 542 and a representative designated by plaintiffs a quarterly report setting forth sufficient information regarding the earnings of minority and non-minority operating engineers for the previous quarter and the year-to-date to permit a determination of whether there has been compliance with the non-discrimination provisions of ¶ 5 of the Judgment and Decree.

(e) Local 542 shall submit to the Master, the Reporting Committee and a representative designated by plaintiffs a quarterly report setting forth sufficient information regarding union membership and additions thereto for the previous quarter and the year-to-date to permit a determination of whether Local 542 is in compliance with its obligations under ¶¶ 14-26.

(f) The JATC shall submit to the Master, the Reporting Committee, and a representative designated by plaintiffs a quarterly report setting forth sufficient information regarding the membership and operation of the apprentice program for the previous quarter and the year-to-date to permit a determination of whether the JATC is in compliance with its obligaitons under paragraphs 31-38.

(g) The parties shall attempt to agree on the form and the schedule for submission of the reports required by subparagraphs (c)-(f). Any matters as to which the parties cannot agree shall be submitted to the Master.

XI. ALLEGATIONS OF NONCOMPLIANCE WITH GOALS

44. (a) In the event that at the end of any year, the reports filed pursuant to paragraph 43 indicate that any

of the goals set forth in this Decree have not been met for that year, the parties shall meet and attempt to agree on the corrective action, if any, that should be undertaken. Any corrective action agreed upon by the parties shall be submitted to the Master and shall be deemed to be approved unless the Master rejects the parties' proposal within twenty-one (21) days of its submission.

(b) In the event that the parties are unable to agree, the plaintiffs shall so inform the Master. After reviewing the positions of all parties and considering the burdens of proof imposed in paragraph 29, the Master shall issue a ruling regarding the corrective action, if any, to be undertaken. Such corrective action, if ordered, may include an increase in the minority entry ratios into the parent body, C Branch, or the apprentice program; an increase in the rate of minority referrals as provided for in paragraph 16; or any other corrective action deemed appropriate. If necessary in the Master's judgment to prevent future disparities, the Master may also increase the minimum hours goals imposed under paragraph 12.

(c) The Master may take corrective action on the basis of the quarterly reports upon notice to and consultation with the parties.

XII. STATUTORY REQUIREMENTS

This Court has determined that all of the obligations imposed upon defendants by this Decree are required for compliance with 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, that none will result in discrimination under those statutes, and that each is ordered pursuant to this Court's equitable powers under these statutes.

XIII. NOTICE

46. Each member of the plaintiff and the defendant classes shall be sent, by certified mail, return receipt re-

quested, a copy of this Judgment and Decree. This mailing shall also include a notice summarizing this Decree as well as this Court's opinion on liability which was filed and impounded on November 30, 1978 and released from impoundment on January 2, 1979. Counsel shall agree on the wording of this notice within 30 days from the date of this decree. In the event the parties are unable to agree within the 30-day period, any unresolved matters shall be submitted to the Master. The costs of notification shall be borne by the defendants.

XIV. POSTING AND PUBLICITY

47. Defendants shall post conspicuously copies of this Judgment and Decree and the Notice agreed to under Paragraph 46 in a place and manner designed to ensure that those affected by it have the maximum opportunity to familiarize themselves with its content. In addition, the parties shall agree on a program to publicize the opportunities afforded by the terms of this Decree, and the procedures available for taking advantage of such opportunities. The text of all materials used for this publicity shall be furnished in advance to the plaintiffs and the Master. If the parties cannot reach agreement with respect to the publicity program, the matter shall be submitted to the Master.

XV. ATTORNEYS' FEES AND COSTS

48. Individual and class plaintiffs and plaintiff Commonwealth of Pennsylvania, as prevailing parties, are entitled to a reasonable award of attorneys' fees and costs. Plaintiffs' counsel are therefore directed to submit to the defendants and file with the Court an appropriate motion in this regard within forty-five (45) days of the date of this Judgment and Decree.

XVI. RETENTION OF JURISDICTION

49. This Decree and all its provisions except for paragraphs 5-8 shall terminate on August 31, 1985 unless,

prior to that date, good cause is shown for an extension of any provisions of the Decree or for their earlier termination.

50. This Court shall retain continuing jurisdiction over this action to ensure compliance with the terms and provisions of this Judgment and Decree. That jurisdiction shall terminate, either upon this Court's own motion, or upon motion of any party, at such time as the Court concludes that the rights of plaintiffs have been accorded and satisfied by the defendants.

BY THE COURT;

/s/ A. Leon Higginbotham
A. LEON HIGGINBOTHAM
Circuit Judge *

DATED: August 8, 1979

* United States Court of Appeals Judge Sitting by Designation.

[Opinion of the District Court, November 7, 1979 (488 F. Supp. 988) is reprinted at pp. 182-193 of the Appendix to Petition for Certiorari in No. 81-280.]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

MOTION OF COMMONWEALTH OF PENNSYLVANIA FOR AWARD OF ATTORNEYS FEES

Now comes the Commonwealth of Pennsylvania, by its attorneys, and moves this Court for an award of attorneys fees in the amount of $93,125.31. This sum is an evaluation of a portion of the time spent and services provided to Plaintiff Commonwealth of Pennsylvania by its counsel from the outset of this litigation to the present time. In support of this Motion, the Commonwealth states as follows:

1. On November 8, 1971, the Commonwealth together with class plaintiffs commenced this litigation by filing a class action complaint alleging violation by class defendants of state and federal statutory and constitutional provisions banning racial discrimination in employment.

2. In particular, Plaintiffs alleged that Local 542 of the International Union of Operating Engineers, various contractors employing individuals referred by Defendant Local 542, four construction trade associations which represent the employers in negotiations, and the Joint Apprenticeship Training Committee (an organization created by Local 542 and the trade associations for the induction of new operating engineers) were excluding blacks from jobs in the construction industry in violation of the following statutes: 42 U.S.C. §§ 1981, 1983, 1985(3), Title VI of the Civil Rights Act of 1964, (42 U.S.C. § 2000(d)), Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000(e)), Section 301 of the Labor-Management Relations Act of 1947 (29 U.S.C. § 158), the Pennsylvania Human Relations Act (43 P.S. 951 *et seq.*); as well as the Thirteenth and Fourteenth Amendments to the United States Constitution.

3. The Defendants strenuously contested all issues raised in connection with the litigation, as is indicated by the volumes of court papers and other correspondence which have accumulated in the record during the nine years since the action commenced. In addition, numerous interlocutory appeals were taken by defendants to the United States Court of Appeals for the Third Circuit.

4. Judge Higgenbotham entered an order on November 30, 1978, finding the Defendant Union in violation of Titles VI and VII of the 1964 Civil Rights Act, 29 U.S.C. § 158, 42 U.S.C. § 1981, and 42 U.S.C. § 1985(3), and the other defendants in violation of 42 U.S.C. § 1981.

5. A subsequent decree, filed on August 8, 1979, grants the Plaintiffs injunctive relief consistent with that sought by the Complaint. It also provides, in paragraph 48, that the Commonwealth, as a prevailing party, is entitled to a reasonable award of attorneys fees and costs.

6. Further authorization for an award of attorneys fees exists pursuant to the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988, as well as 28 U.S.C. §§ 1920 and 1923 and F.R.C.P. 54(d).

7. During the course of the litigation, close to twenty attorneys have represented the Commonwealth.

8. The following persons, for whom an award of fees is not being sought, worked on this action on behalf of the Commonwealth:

Attorney General J. Shane Creamer
Attorney General Israel Packel
Attorney General Robert P. Kane
Attorney General Edward G. Biester, Jr.
Deputy Attorney General Lawrence Hoyle
Deputy Attorney General J. Justin Blewitt, Jr.
Assistant Attorney General Michael Minkin
Deputy Attorney General Michael Von Moschzisker

Deputy Attorney General Edward Weintraub
Deputy Attorney General Barry Roth
Legal Assistant Steven Paul Mahinka
Legal Assistant Marjorie D. Hunter
Student Intern William R. Toal, III

The Commonwealth has chosen not to seek fees for these persons because they did not take on major or central responsibility for the litigation and it has been the Commonwealth's intention to keep the total request for attorney's fees conservative and reasonable. Furthermore, as to the Attorneys General, the Commonwealth was unable to establish an adequate monetary value to their services. It is estimated, however, that were the hours for the above persons included in this request for fees, the time expended would be significantly in excess of 100 hours.

9. The Commonwealth has computed its request for attorneys fees as follows:

(a) For the time and services provided by Peter W. Brown, Esquire, the sum of $2,698.75 (See Exhibit A attached hereto and incorporated herein by reference):

b) For the time and services provided by Thomas J. Oravetz, Esquire, the sum of $12,350.00 (See Exhibit B attached hereto and incorporated herein by reference);

c) For the time and services provided by Burton D. Morris, Esquire, the sum of $2,250.00 (See Exhibit C attached hereto and incorporated herein by reference);

d) For the time and services provided by M. Faith Angell, Esquire, the sum of $11,968.00 (See Exhibit D attached hereto and incorporated herein by reference);

e) For the time and services provided by Margaret E. Anderson, Esquire, the sum of $19,623.00 (See Exhibit E attached hereto and incorporated herein by reference);

f) For the time and services provided by D. Bruce Hanes, Esquire, the sum of $9,330.00 (See Exhibit F attached hereto and incorporated herein by reference);

g) For the time and services provided by Jack G. Handler, Esquire, the sum of $9,090.00 (See Exhibit G attached hereto and incorporated herein by reference);

h) For the time and services provided by Margaret H. Hunting, Esquire, the sum of $2,337.50 (See Exhibit H attached hereto and incorporated herein by reference);

10. The sums enumerated in paragraph 9 above are premised on historic rather then current rates of attorney compensation.

11. The Commonwealth also seeks an incentive multiplier of 25% in excess of the base sums enumerated in paragraph 9.

12. In addition the Commonwealth seeks an award of fees for time expended on the issue of attorneys' fees.

a) For the time and services provided by Margaret H. Hunting, the sum of $1,180.00 (See Exhibit H attached hereto and incorporated herein by reference).

b) For the time and services expended by Joel M. Ressler, the sum of $3,675.00 (See Exhibit I attached hereto and incorporated herein by reference).

WHEREFORE, the Commonwealth prays this Court award it the "lodestar" sum of $69,647.25 as reasonable attorneys' fees incurred in the prosecution of this action, to add thereto via a multiplier factor of 25% the sum of $17,411.81 to reflect the nature and beneficial effect of the services rendered on the issue of attorneys' fees, which sum then becoming payable is $91,914.06.

[Signatures Omitted in Printing]

[Filed March 10, 1980]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

[Excerpt from Transcript of Proceedings, May 13, 1980]

* * * *

[2-28] [THE COURT] But at the moment I will say multiple district involvement by an employer will have to be treated on a district-by-district basis although within the district, several jobs can be aggregated for that employer.

All right, now, let me take up very briefly the question of costs. I will hear brief argument on the question of costs and notice to the class members, defendant class members.

Costs of the Master, I guess I could hear argument. I have your briefs. Let me make a few observations, then; that would be better, than hear argument.

I think we begin with the notion that the Court decree found Local 542 and the JATC liable by their having participated in deliberate discrimination and activities that resulted in disparate impact. For that reason the costs will fall upon in this Court's view Local 542 and JATC jointly and severally.

Now, it seems to the Court that that's in respect to notice to class members, plaintiff class members.

In respect to defendant contractors, who will not be bound by the decree until they receive notice of it, unless they're named parties, the cost of furnishing those contractors with the appropriate notice in the form of a decree should be borne by Local 542 and JATC except for [2-29] members that are—well, contractors who are members or affiliated or associated in some way with named defendant associations. I know of no authority that can put the costs of any of that on unnamed defendants, class defendants, or otherwise.

Now, I leave there and go into the question of the cost of the Master, and again the cost of the Master

initially should be on Local 542 and JATC because that's the only party the Court found liable for damages primarily or—we will get to damages in a minute—found liable that could result in damages later or would result in costs now.

Now, the remedy it seems to me for the Local is that in the event following a damage hearing by a particular employee or initiation of one of the Local believes that a particular contractor who is not a named defendant—but believes that it can demonstrate that that contractor participated in the wrongful act—the classic remedy of indemnification or contribution would lie and presumably that contractor would be joined as a third-party defendant or sued in a separate indemnity proceeding.

I know of no way that any class plaintiff can institute a suit against any unnamed class member defendant.

[Opinion of the District Court, December 23, 1980 (507 F. Supp. 1146) is reprinted at pp. 194-225 of the Appendix to Petition for Certiorari in No. 81-280.]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Title Omitted in Printing]

PHILADELPHIA, PENNSYLVANIA,

February 24, 1981

BEFORE:

HONORABLE JOSEPH F. WEIS, JR., Circuit Judge
HONORABLE LEONARD I. GARTH, Circuit Judge
HONORABLE JACK R. MILLER, Associate Judge
U.S. Court of Customs and Patent Appeals

[Excerpt from Transcript of Oral Argument, pp. 66-68, 74, 77-78]

* * * *

[66] [MR. GOODMAN.][*] . . . As Judge Higginbotham found, and I believe he's right, as a matter of law, the duty not to discriminate is inflexible.

Now, what do the employers do? It now said all new entries into the profession, you decide that, Local 542. And once they're in, Judge Garth, whether they're apprentices, whether they're registrants, you decide precisely where they go to work, how long they work, et cetera. That's a decision we give to you in collective bargaining. Every one of the employers, about fifteen hundred, stand in the same situation. They have executed or adhered to those collective bargaining agreements.

What basis is there in the law, what basis is there in 1981 to give an exemption, essentially to the contractors simply because they decide for economic, political or whatever reasons to rely on Local 542.

Judge Weis, you asked Mr. McAleese about the property owner situation. That sort of implicates the whole area almost to strict liability that has been flowing through the

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[* Counsel for individually named and class plaintiffs.]

law in our jurisprudence for the last one hundred years. In products liability, the evisceration of holder in due course, people are held [67] accountable for what is in the first instance their duty, their obligation.

Now, 1981, which is the source, the sole source of liability vis-a-vis the defendant class has been mentioned a great deal. What has not been mentioned is its precise language. All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts as is enjoyed by white citizens. None of my opponents, not one, has contended that my clients, Black and other minority operating engineers, have had the same right to make contracts as whites. They have not. That is a precisely undisputed fact. Blacks have been discriminated in entry. They've been discriminated in referrals. They've been beaten up, and they've been denied jobs. They've been denied wages. The very things which presumably, if the employers had not delegated to Local 542, would not happen.

So why are we here? Because Local 542 class-wide practice racial discrimination. And the question is what is the responsibility of the employers.

THE COURT: I take it you would not make any distinction then between the situation where the employers knew about discrimination and the employers did [68] not know?

MR. GOODMAN: Yes, sir, I would not.

THE COURT: That's an absolute liability?

MR. GOODMAN: Absolutely. And that is precisely our position. It has been from the day the Complaint was filed. It has not varied one iota.

* * * *

[74] MR. GOODMAN: Yes, I think it is. But let me take a step back. Because I think the notion of agency and control, which I'll later address, are smokescreens. As Judge Miller pointed out, our theory of the case in

the beginning, and it is found by Judge Higginbotham is one of strict liability. So there is a cost of doing business, I'd say, like one is responsible for its torts to the property owner situation that Judge Weis made, that you shall not engage in racial discrimination.

Now, if you come from another country, with all due respect, and you go to Philadelphia or Delaware or the jurisdiction covered by Local 542, Judge Garth, and you make a decision, I'm going to engage you, Local 542, to be my agent for operating engineers; that's what they did. Local 542 practices . . .

THE COURT: Mr. Wald calls our attention to a company that is one hundred percent staffed with minorities. Are they too—do they fall within the same grouping?

MR. GOODMAN: Yes, I think they do. And let me explain why. To begin with, that company . . .

THE COURT: That's an interesting [75] concept.

MR. GOODMAN: Yes, that company had two operating engineers, and those two operating engineers were both Black. The company filed a motion after receiving notice. And by the way, all of the employers received notice in this case by certified mail. And that went out in late December, early January, 1973 or 1974.

Now, Barger filed a motion for summary judgment. The District Court denied it without opinion. But essentially on this theory, Judge Garth; when you entered into that contract with Local 542, whether you are one company, one of fourteen hundred eighty-eight, you made a decision, not just a decision that applies to you, namely you rely on us for workers, but you also did something to the plaintiffs. You made those plaintiffs subject to Local 542's discrimination. In short, you hired Blacks. No doubt about that.

And that wasn't analyzed at stage one, and in my judgment shouldn't be, and I'll address that in a moment. Your agent discriminated broadly against Black and other minority operating engineers. You are an industry.

This is not a litigation industry. This is a labor industry, an employer labor industry. And you have, as a result, this one company, also limited minorities [76] from getting jobs with other employers on a basis that was free of racial discrimination.

Because John Dent and Lloyd Hudson and Timothy Roundtree still, by virtue of your contract, had to rely on Local 542. They could not go out and solicit jobs on their own.

THE COURT: Are you telling me that this is the analysis that the District Court employed?

MR. GOODMAN: With respect to Barger in denying the motion for summary judgment? No, sir. The motion for summary judgment was filed pretrial and an order was issued denying it. There was no accompanying opinion. However, the District Court's findings with respect to the entire class of employers covers some fifteen pages and deals with the precise question of whether or not one has to analyze at stage one individual employers' statistics.

THE COURT: Now, don't get off this point. Do I understand that if we do not buy your argument, that a contractor who because he is going to use 542 and may have so decided back in 1950 or '59 or whenever, is the exact same thing as an employment agency which helps the employer engage secretaries? If we don't buy your argument, do I understand then that there is no [77] way that the contractors can be held in here?

MR. GOODMAN: No, sir. If I might, with respect to the employment agency, I think this is a much stronger situation. I don't know of any employer that would say to any employment agency, you're my exclusive course for hiring employees. Many employers will delegate it to an employment agency, but never given up their own right if some applicants, you know, filed an application with it directly.

This situation is entirely different. This is compulsive. The employers have agreed to be bound exclusively by

Local 542. So there is that distinction, I think, therefore making this case stronger.

THE COURT: Where does that intent for 1981 purposes come in?

MR. GOODMAN: From Local 542's intentional discrimination.

THE COURT: You impute the intent?

MR. GOODMAN: Yes, sir, that's absolutely correct. Now, with respect to Mr. Dacies . . .

THE COURT: Even if they didn't know about it, what you're saying is that there has been a finding that Local 542 has intended to do what it did, reprehensible as it may be. If we uphold that, that [78] therefore that intent rubs off on anybody that did business with 542?

MR. GOODMAN: Yes, sir. That is our argument.

THE COURT: That is your theory?

MR. GOODMAN: That is our theory. It is the District Court's theory. It is one of strict liability. And although I am going back to it, it seems to me whenever an employer chooses to . . .

THE COURT: Do you know of any case that has ever gone that far? Because I, in my reading of the cases, I think that we would be breaking new ground. Not that we're averse to it, but I would like to always have a little solace of knowing that there may be somebody that may have trod on the path before us.

MR. GOODMAN: I think when you asked the question about new ground, presuming your Honor's question goes to the issue of knowledge, actual or construction . . .

THE COURT: Well, this imputed intent that Judge Miller was talking about.

MR. GOODMAN: Well, the answer to that is yes. And that's why I cited . . .

THE COURT: From 1981 . . .

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2073/74 & 80-2159/60/61/62/63

[Title Omitted in Printing]

Present: SEITZ, *Chief Judge*, ALDISERT, GIBBONS HUNTER, WEIS, GARTH and SLOVITER, *Circuit Judges* *

AMENDED ORDER

A majority of the active judges having voted for rehearing in banc in the above, it is

ORDERED that the Clerk of this Court list the above case for rehearing before the Court in banc at the convenience of the Court.

BY THE COURT

/s/ Joseph F. Weis, Jr.
Circuit Judge

DATED: March 11, 1981

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* Judges Adams and Higginbotham did not participate in the consideration of this matter.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2073/74 & 80-2161/62/63

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, WILLIE MCKAY, MARION J. EADDY, RANDOLPH HUGHES, JR., ARIEL BROWNLEE, WILLIAM BOSTIC, KENNETH HOWARD, ALPHA CHRISTMAS, RONALD RICHARDSON, CLARENCE WINDER, RONALD CRAWFORD, and FRANK GILCHRIST, on their own behalf and on behalf of all others similarly situated,

v.

LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS; OPERATING ENGINEERS JOINT APPRENTICESHIP AND TRAINING COMMITTEE OF PHILADELPHIA, EASTERN PENNSYLVANIA, and the STATE OF DELAWARE; GENERAL BUILDING CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, UNITED CONTRACTORS ASSOCIATION, and PENNSYLVANIA EXCAVATING CONTRACTORS ASSOCIATION, on their own behalf and on behalf of all others similarly situated,

and

GLASGOW, INC., on its own behalf and on behalf of all others similarly situated,

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, *et al.*,
Appellants in Nos. 80-2073/74 & 80-2161

UNITED ENGINEERS & CONSTRUCTORS, INC.,
nonparty member of the defendant class in the above-captioned action,
Appellant in No. 80-2162

BECHTEL POWER CORPORATION, an unnamed member of the defendant class of contractor-employers in the above-captioned matter.
Appellant in No. 80-2163

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 71-2698)

Argued February 24, 1981
Before: WEIS and GARTH, *Circuit Judges* and
MILLER, *Judge, Court of Customs and Patent Appeals* *

Reargued May 12, 1981 In Banc

Before: SEITZ, *Chief Judge*,
ALDISERT, GIBBONS, HUNTER, WEIS, and GARTH,
Circuit Judges

(Filed May 19, 1981)

John J. McAleese, Jr.
Thomas J. McGoldrick (Argued)
D. Richard Powell, Jr.
Luis A. Minella
Cuniff, Bray & McAleese
240 One Bala Cynwyd Plaza
Bala Cynwyd, Pa. 19004
Attorneys for Appellants
Glasgow, Inc., and
The Contractors Ass'n of
Eastern Pennsylvania, et al.

---

* The Honorable Jack R. Miller, United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

Martin Wald (Argued)
Nicholas N. Price
Schnader, Harrison, Segal & Lewis
1719 Packard Bldg.
Philadelphia, Pa. 19102
Attorneys for Appellant and Appellee United Engineers & Constructors Inc.

Robert W. Kopp (Argued)
Raymond W. Murray, Jr.
David M. Pellow
Bond, Schoeneck & King
One Lincoln Center
Syracuse, N.Y. 13202
Attorneys for Appellant and Appellee Bechtel Power Corp.

John G. Kester (Argued)
John J. Buckley, Jr.
Williams & Connolly
Hill Bldg.
Washington, D.C. 20006
Attorneys for Appellant General Building Contractors Ass'n

Harold I. Goodman (Argued)
Germaine Ingram
Community Legal Services, Inc.
Sylvania House
Juniper and Locust Streets
Philadelphia, Pa. 19107
Attorneys for Individually Named and Class Appellees

Joel M. Ressler
Louis J. Rovelli
Margaret Hunting
Deputy Attorneys General
LeRoy S. Zimmerman
Attorney General
Department of Justice
Strawberry Square
Room 42, 16th Floor
Harrisburg, Pa. 17120
Attorneys for Appellee
Commonwealth of
Pennsylvania

LeRoy D. Clark
General Counsel
Constance L. Dupre
Acting Associate
General Counsel
Vincent Blackwood
Kenneth J. Burchfiel
Attorneys
Equal Employment
Opportunity Commission
2401 E Street, NW
Washington, D.C. 20506
Attorneys for Amicus
Curiae EEOC

OPINION OF THE COURT

PER CURIAM:

To the extent that the judgment of the district court is challenged by these appeals, it is affirmed by an equally divided court.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2159/60

[Title Omitted in Printing]

LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS,
Appellant in No. 80-2159

OPERATING ENGINEERS JOINT APPRENTICESHIP and TRAINING COMMITTEE OF PHILADELPHIA, EASTERN PENNSYLVANIA, and the STATE OF DELAWARE,
Appellant in No. 80-2160

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 71-2698)

Argued February 24, 1981

Before: WEIS and GARTH, *Circuit Judges*, and
MILLER, *Judge, Court of Customs and Patent Appeals* *

Reargued May 12, 1981 In Banc

Before: SEITZ, *Chief Judge*,
ALDISERT, GIBBONS, HUNTER, WEIS, and GARTH,
Circuit Judges

(Filed May 19, 1981)

Marvin I. Barish
Gordon Gelfond (Argued)
Rohm & Haas Bldg., 2d Floor
Philadelphia, Pa. 19106
Attorneys for Appellants
Local Union 542
and Operating Engineers
Joint Apprenticeship
Training Committee

John J. McAleese, Jr.
Thomas J. McGoldrick (Argued)
D. Richard Powell, Jr.
Luis A. Minella
Cuniff, Bray & McAleese
240 One Bala Cynwyd Plaza
Bala Cynwyd, Pa. 19004
Attorneys for Appellants
Operating Engineers
Joint Apprenticeship
Training Committee

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* The Honorable Jack R. Miller, United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

Harold I. Goodman (Argued)
Germaine Ingram
Community Legal Services, Inc.
Sylvania House
Juniper and Locust Streets
Philadelphia, Pa. 19107
Attorneys for
Individually Named and
Class Appellees

Joel M. Ressler
Louis J. Rovelli
Margaret Hunting
Deputy Attorneys General
LeRoy S. Zimmerman
Attorney General
Department of Justice
Strawberry Square
Room 42, 16th Floor
Harrisburg, Pa. 17120
Attorneys for Appellee
Commonwealth of
Pennsylvania

OPINION OF THE COURT

PER CURIAM:

Essentially for the reasons set forth in the opinions of the district court, *see Commonwealth of Pennsylvania v. Local Union 542*, 469 F. Supp. 329 (E.D. Pa. 1978); 488 F. Supp. 988 (E.D. Pa. 1979); 502 F. Supp. 7 (E.D. Pa. 1979), and to the extent that the judgment of the district court is challenged by these appeals, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the
United States
Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2073/74 & 80-2161/62/63

[Title Omitted in Printing]

Present: SEITZ, *Chief Judge* and ALDISERT, GIBBONS, HUNTER, WEIS, and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on February 24, 1981 and later reargued en banc on May 12, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court entered August 8, 1979, November 7, 1979, March 25, 1980, March 26, 1980, May 30, 1980, June 10, 1980, June 17, 1980 and June 27, 1980, be, and the same are hereby affirmed, all in accordance with the opinion of this Court. Costs taxed against appellants.

Attest

/s/ Sally Mrvos
Clerk

May 19, 1981

SUPREME COURT OF THE UNITED STATES

No. 81-280

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.,
Petitioner,

v.

PENNSYLVANIA, *et al.*

ORDER ALLOWING CERTIORARI

Filed October 19, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with case No. 81-330, *United Engineers & Constructors, Inc. v. Pennsylvania, et al.*, case No. 81-331, *Contractors Association of Eastern Pennsylvania and United Contractors Association v. Pennsylvania, et al.*, case No. 81-323, *Glascow, Inc. v. Pennsylvania, et al.*, and case No. 81-333, *Bechtel Power Corporation v. Pennsylvania, et al.*, and a total of one hour is allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

No. 81-202

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Petitioners,

v.

CLAIBORNE HARDWARE COMPANY, *et al.*

ORDER ALLOWING CERTIORARI

Filed November 9, 1981

The petition herein for a writ of certiorari to the Supreme Court of the State of Mississippi is granted. The case is set for oral argument in tandem with case No. 81-280, *General Building Contractors Association, Inc.* v. *Pennsylvania* and related cases. Justice Marshall took no part in the consideration or decision of this petition.

Opposition

Office - Supreme Court,
FILED
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ALEXANDER L. STEVA
CLERK

Nos. 81-280, 81-330, 81-331, 81-332 and 81-333

IN THE

Supreme Court of the United States

October Term, 1981

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.; THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA; THE UNITED CONTRACTORS ASSOCIATION; GLASGOW, INC.; BECHTEL POWER CORPORATION; and UNITED ENGINEERS AND CONSTRUCTORS, INC.,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, et al.,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

LEROY S. ZIMMERMAN
Attorney General
MARGARET HUNTING*
JOEL M. RESSLER
Deputy Attorneys General
Office of Attorney General
Strawberry Square, 16th Floor
Harrisburg, Pennsylvania 17120
(717) 787-5030

Attorneys for Respondent Commonwealth of Pennsylvania

HAROLD I. GOODMAN*
GERMAINE INGRAM
Community Legal Services, Inc.
Sylvania House
Juniper and Locust Streets
Philadelphia, Pennsylvania 19107
(215) 893-5354

Attorneys for Individually Named and Class Respondents

*Counsel of Record

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTIONS PRESENTED

1. Whether the courts below correctly held a defendant class of contractor associations and employers liable under 42 U. S. C. § 1981 when: (a) the defendant class delegated to a union hiring hall the exclusive right to admit workers into the operating engineers trade and refer them to jobs and (b) that hiring hall, in effectuating that delegation, engaged in a pattern and practice of discrimination against qualified minorities?

2. Whether it was proper to certify under Fed. R. Civ. P. 23(b)(2) a defendant class consisting of all contractor associations and employers who bound themselves to an industrywide exclusive hiring hall for the admission and referral of operating engineers to jobs when that hiring hall engaged in a pattern and practice of racial discrimination against qualified minorities?

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Nos. 81-280, 81-330, 81-331, 81-332 and 81-333

IN THE

Supreme Court of the United States

October Term, 1981

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.; THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA; THE UNITED CONTRACTORS ASSOCIATION; GLASGOW, INC.; BECHTEL POWER CORPORATION; and UNITED ENGINEERS AND CONSTRUCTORS, INC.,

Petitioners

v

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, et al.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Commonwealth of Pennsylvania and Raymond Williams, on their own behalf and on behalf of all named and class plaintiffs below, respectfully submit this joint Brief in Opposition to the five certiorari petitions docketed at Nos. 81-280 and 81-330 through 81-333.

STATEMENT OF THE CASE

Notwithstanding the Petitioners' characterizations, Respondents respectfully submit that this case does not involve the question of whether 42 U. S. C. § 1981 prohibits only intentional racial discrimination. For here, regardless of the reach of Section 1981, Respondents satisfied the more rigorous standard of intentional discrimination by their proof of a pattern and practice of discrimination against a plaintiff class of minorities by an exclusive hiring hall operated on behalf of a defendant class of employers by Local 542 of the International Union of Operating Engineers ("Local 542" or "the Union").

In this Court, no Petitioner challenges the finding below that minorities were purposefully denied entry into the operating engineers craft and employment with the class of employers as a result of the classwide racial discrimination practiced by Local 542 and its joint union-employer apprenticeship program, the JATC.[1] Nor does any Petitioner challenge the related holding of the courts below that the Section 1981 right of minorities to "make and enforce contracts" with the defendant class of employers on the same basis "as is enjoyed by white citizens" was purposefully violated by Local 542. Therefore, the question posed by this case, and the limited question decided by the courts below, is whether Local 542's intentional discrimination should be imputed to the members of the defendant class of contractor associations and employers.

Statement of the Relevant Facts

The facts necessary to review the merits of the certiorari petitions have been comprehensively analyzed in

1. The acronym JATC refers to the Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania and the State of Delaware.

the District Court's liability opinion (JA. 23-132).[2] Since they are undisputed, they need only be briefly outlined here.

Ever since 1961, Local 542 has operated an exclusive, industrywide hiring hall for the employment of operating engineers in its jurisdiction.[3] That hiring hall is the product of various collective bargaining agreements negotiated over the years between the Union and the contractor associations.[4] Pursuant to those agreements, all Local 542 employers are required to rely on the Union for operating engineers. No employer is permitted to accept direct applications or to hire on its own; similarly, no person affiliated with Local 542 or desiring entry into the craft is permitted to directly apply for work with an employer which is subject to a Local 542 contract. In this way, the employers have collectively delegated two fundamental management decisions to the Union: entry into the operating engineers craft and allocation of admitted workers to jobs within the industry.

---

2. The reference "JA" is to the Joint Appendix filed by United Engineers & Constructors, Inc., Glasgow, Inc., Bechtel Power Corporation, the United Contractors Association and the Contractors Association of Eastern Pennsylvania.

3. The Union's jurisdiction encompasses eastern Pennsylvania and the entire State of Delaware. Because of its size, Local 542 is divided into five districts, each one operating a hiring hall pursuant to a common hiring system required by the Union's collective bargaining agreements.

4. The contractor associations which originally executed those agreements included Petitioners Contractors Association of Eastern Pennsylvania ("CAEP") and General Building Contractors Association, Inc. ("GBCA"). Since 1971, all negotiations with Local 542 have been conducted by an umbrella association called the Operating Engineers Employers of Eastern Pennsylvania and Delaware.

At trial Respondents proved, and the courts below found, that the nature of the discrimination which minorities suffered corresponded precisely to the nature of the control which the employers had vested in Local 542. That discrimination had two fundamental components: the first was exclusion of hundreds of qualified minorities from the craft, and the second was discrimination in referrals against those few minorities who were able to become affiliated with Local 542 and the JATC. The result of that discrimination was reflected in the employers' collective workforce: hardly any minorities were employed by them as operating engineers.[5]

Petitioners have attributed that discrimination solely to Local 542. They are mistaken. The hiring hall could never have functioned without the approval and involvement of the employers and the contractor associations. Nor could the pattern and practice of discrimination against minorities have succeeded without the industry's acceptance and utilization of discriminatory referrals from the Union. In other respects too, the employers and contractor associations were far more than innocent bystanders:

1. As early as 1963 several contractor associations accused Local 542 of racial discrimination. Yet, not only that year, but every year thereafter, the associations executed an exclusive hiring hall agreement with Local 542 that became, in effect, a standard industrywide system to which all union employers adhered.[6] Not once since the

5. The trial evidence showed that during the years 1969-1971, 70% of the 1,488 employers in the defendant class never employed any minority operating engineers at all; only a miniscule percentage of employers, 1.6% (23 of the 1,488), employed minorities at or above the 10% level in their own individual workforces (JA. 65-66).

6. *See, e.g.*, Trial Transcript, 132nd Day, at 12,036; 135th Day, at 12,222-23.

hiring hall has been in effect have the associations taken any steps to correct or even challenge the Union's class-wide discrimination against minorities.

2. Nor was Local 542 solely responsible for the creation of the JATC. That program was jointly established by both the Union and the contractor associations to provide an industrywide method of apprenticeship training. There are an equal number of employer and Union trustees who are legally responsible for the JATC's operation. The finding below that the JATC engaged in a pattern and practice of racial discrimination against minorities (JA. 121-127) is not challenged here.

3. The contractor associations, including Petitioners CAEP and GBCA, participated with Local 542 in the deceptions that caused the United States Department of Labor to exclude the operating engineers craft from the coverage of the Philadelphia Plan (JA. 30-37). Had those deceptions not succeeded, "[t]he Philadelphia Plan would have resulted in a higher number of minority group members in the union and in the related industry." (JA. 36).[7]

4. The associations, acting on behalf of not only their own members, but also for all other Local 542 employers, participated with the Union in three training programs which were part of a craftwide Affirmative Action Program

7. The District Court rejected the assertions of Petitioners CAEP and GBCA that they were not responsible for the fraud that was perpetrated on the federal government. It observed: "These were not innocent prognosticators who were misled by the union's scheme to give inaccurate information" (JA. 37). The District Court went on to find:

> The conduct of the associations particularly with respect to the "Affirmative Action Program" which substituted for the Philadelphia Plan demonstrated a reckless disregard for equal employment opportunity for minorities . . .

(JA. 128)

designed to admit new minorities to the trade and upgrade the skills of minorities already affiliated with Local 542. These programs were largely financed by the federal government and the Commonwealth of Pennsylvania [8] and were intended to insure equal employment opportunity for minorities. Instead, "even at this basic level" (JA. 40 n. 15), the programs failed to provide minorities with the training and upgrading to which they were entitled (JA. 37-40).

5. Finally, the hiring hall itself represented a joint venture between Local 542 and all employers within its jurisdiction. It proved to be a ready source of labor for the employers who otherwise would have been compelled to accept applications and make direct hires on their own. The employers voluntarily chose to continue their exclusive reliance on Local 542 despite efforts by the federal government to provide equal employment opportunities for minority operating engineers (JA. 31). The result of that exclusive reliance, as revealed in the collective workforce of the employers, was a denial of jobs and wages to qualified and available minorities.

The Opinions of the District Court

Prior to trial the District Court entered an order bifurcating the case into, first, a classwide liability phase and then, to the extent necessary, an individualized relief phase. Consistent with the bifurcation order, the District Court carefully avoided making any individualized determinations at Stage I with respect to either the claims of any member of the plaintiff class (JA. 93-4) or the liability of any member of the defendant class (JA. 132, 196).

8. In addition, the Commonwealth of Pennsylvania required the employers to contribute $80,000 for one of these training programs as a precondition for eligibility for bidding on state contracts. As a result, the contractors formed Construction Training, Inc. in order to make the necessary financial arrangements for funding their share of the program (JA. 39).

Stage I focused entirely on two classwide issues: (1) did the collectively-bargained exclusive hiring hall operate to intentionally discriminate against minorities as a class? and (2) if it did, were the associations and the employers liable as a class under Section 1981 for the hiring hall's discrimination?

The District Court answered both questions affirmatively. As to the first, its liability opinion (JA. 9-252) concluded that the hiring hall "was not bona fide in structure" (JA. 120) and was operated discriminatorily to deny minorities both access to the craft and referrals to operating engineers jobs. That holding is not challenged here. As to the second question, the District Court found that the Union's discrimination was properly attributed to the members of the defendant class (JA. 195). The District Court held that plaintiffs had satisfied their burden by proving that "(1) the employers delegated an important aspect of their hiring procedure to the union; [and] (2) the union, in effectuating the delegation, intentionally discriminated or, alternatively, produced a discriminatory impact" (JA. 195). It reached this conclusion by reasoning:

> It is the mass of employers collectively who by originally agreeing to or subsequently adopting the exclusive hiring hall provision, effectuated a *collective* delegation of the employment application process. Because of this delegation, the intentional discrimination of the union was able to work its way broadly into the common workforce of operating engineers. Inasmuch as the delegation of the application process was meant to be industrywide within 542's jurisdiction, and is a product of all those employers agreeing to a single arrangement, those employers must together share responsibility, at least injunctively, for the discrimination by the union.

(JA 195) (emphasis in original).

This holding is challenged by each of the Petitioners. Also challenged is the District Court's certification of the defendant class pursuant to the provisions of Rule 23(b)(2) of the Federal Rules of Civil Procedure.[9] The District Court held that certification was proper under Rule 23(b)(2) because of the very nature of the hiring hall system which compelled both plaintiffs and defendants alike to rely exclusively on Local 542.[10] The District Court reasoned that (b)(2) certification was essential "because of the impossibility of obtaining make-whole injunctive relief from employment discrimination against any particular defendant" (JA. 205).

Following the release of its liability opinion, the District Court issued a Judgment and Decree which provided plaintiffs with a permanent injunction against further acts of racial discrimination (JA. 228-252). The Decree grants plaintiffs three fundamental kinds of affirmative relief—integration into the craft, a proportionate share of jobs and training—and does so gradually over a five-year period.[11] The Decree is classwide in scope and leaves to Stage II of the litigation (which has yet to begin) the resolution of

9. The District Court certified a defendant subclass of contractor associations and a separate subclass of employers who bound themselves to the exclusive hiring hall agreement negotiated by the associations with Local 542.

10. The District Court also held, in the alternative, that certification was proper under the provisions of Rule 23(b)(1)(A) (JA. 140).

11. In support of its Decree, the District Court emphasized:

> The major objectives of the decree are that the percentage of minorities in Local 542, the percentage of referrals they receive, and the percentage of hours they work all equal the percentage of minorities in the relevant communities. In other words, my primary concern is to remedy discrimination in entry, referral and hours.

(JA. 221).

individual questions relating to monetary relief and liability.

The Opinions of the Court of Appeals

Five appeals of the Judgment and Decree were taken to the Third Circuit Court of Appeals, including appeals by Local 542 and the JATC. The appeals were consolidated and initially heard by a panel of the Court. Following the panel argument, the case was relisted and reargued *en banc*. On May 19, 1981 the Court issued two separate decisions. In the first, it unanimously upheld the District Court's liability holding and those portions of the Judgment and Decree that applied against Local 542 and the JATC (JA. 1-3). In the second, it affirmed, by an equally divided vote, the holding of liability and the imposition of injunctive relief against the class of contractor associations and employers (JA. 4-8). It is only the second affirmance that has been brought up for review to this Court.

REASONS FOR DENYING THE WRIT

I. The District Court Formulated and Applied Correct Legal Principles in Holding the Defendant Class of Employers and Employer Associations Liable Under Section 1981 for the Intentional and Systematic Discrimination Practiced by the Exclusive Hiring Hall Which They Established and Relied Upon for the Selection of Operating Engineers

Much of the Petitioners' efforts are directed to the proposition that the courts below erred in deciding that Section 1981 does not require proof of intentional discrimination. Characterizing that decision as presenting a clear conflict with holdings of other circuit and district courts which have held that Section 1981 does require proof of intentional discrimination, they pray that the Writ issue so that the Court can dispositively resolve that important question.

Petitioners have mischaracterized the nature of the case. The courts below concluded, and none of the Petitioners challenges the finding, that intentional discrimination was practiced classwide against minorities as a result of the operation of the exclusive hiring hall system which the employers established and maintained with Local 542.[12] The legal question, therefore, that applies to the

12. The District Court alternatively found that if the case against Local 542 were judged by an adverse impact standard only, then plaintiffs had satisfied that less stringent burden of proof as well (JA. 163-164). It was in the context of that alternative finding that the District Court held that Section 1981 did not require proof of intentional discrimination (JA. 164-167). But that alternative finding and holding did not detract from the ultimate finding and holding that plaintiffs "easily met" their burden of proving intentional racial discrimination in the operation of Local 542's hiring hall (JA. 162). Moreover, when the

Petitioners (and all other associations and employers) is whether the intentional discrimination of the hiring hall was properly imputed to the members of the defendant class. That, we respectfully submit, is a substantively different legal question than the one presented for review by Petitioners.[13]

A. The District Court Correctly Concluded That the Employers' Duty Not to Discriminate Was Non-Delegable

The pivotal issue in this case turns on the nature of an employer's responsibility under Section 1981 when it

12. (Cont'd.)
District Court engaged in its extended discussion of the Section 1981 liability of the defendant class (JA. 167-196), it explicitly predicated its discussion on its finding of intentional discrimination by Local 542: "I find that the contractors and associations are injunctively liable to the plaintiff class under § 1981 as a result of their contractual relationship and use of a hiring system which in practice effectuated *intentional* discrimination, whether or not the employers and associations knew or should have known." (JA. 168) (emphasis added).

13. Perhaps the clearest indication that the Third Circuit did not intend to use this case to decide the standard of proof required under Section 1981 is its decision to schedule oral argument *en banc* in *Croker v. Boeing Company (Vertol Division)*, No. 80-1569, for the specific purpose of deciding the issue there. Oral argument in *Croker* was heard the very same day (May 12, 1981) that the Third Circuit heard oral argument in this case. As of yet, no decision has been filed in *Croker*. In addition, the Court should be aware that Petitioners Glasgow, Inc. and Bechtel Power Corporation conceded before the Third Circuit that it was unnecessary in this case to resolve the issue of whether Section 1981 required proof of intentional discrimination. *See* Brief for Glasgow, Inc., No. 81-2161, at 14; Brief for Bechtel Power Corporation, No. 80-2163, at 31. As a result, Respondents never briefed nor argued the issue below.

executes or becomes a party to an exclusive hiring hall agreement with a racially discriminatory union like Local 542. Respondents submit, and the courts below held, that the duty is no different than an employer's Section 1981 obligation in any other employment context. Certainly nothing in the language of Section 1981 creates or suggests an exemption or special treatment for employers that choose to rely on employment agencies or exclusive union hiring halls.[14] To the contrary, an employer's duty not to discriminate is unequivocable and non-delegable. "There is an inflexible duty not to discriminate" (JA. 110).

For that reason, courts have repeatedly held that ". . . [t]he rights assured by Title VII [and Section 1981] are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert." *Robinson v. Lorillard Corp.*, 444 F. 2d 791, 799 (4th Cir.), *cert. denied*, 404 U. S. 1006 (1971) (Title VII). *See also Carey v. Greyhound Bus Co., Inc.*, 500 F. 2d 1372, 1377 (5th Cir. 1974) (Title VII); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F. 2d 1364, 1381 (5th Cir. 1974) (Title VII and Section 1981); *United States v. N. L. Industries*, Inc., 479 F. 2d 354, 379 (8th Cir. 1973) (Title VII). Nor can claims of passivity, or fears of economic reprisals, permit an employer to avoid its own duty not to discriminate. *Macklin v. Spector Freight Systems, Inc.*, 478 F. 2d 979, 989 (D. C. Cir. 1973) (passivity); *Robinson v. Lorillard Corp., supra*, 444 F. 2d at 799 (fears of a strike).

The duty not to discriminate remains undiminished in the building and construction trades even though em-

14. *Accord, Fruin-Colnon Corp. v. NLRB*, 571 F. 2d 1017, 1020-21 (8th Cir. 1978) (rejecting attempts by employers in the construction industry to gain a special immunity under the National Labor Relations Act for acts of discrimination by exclusive hiring halls) ("Reasonable rules may be established but the hiring halls and arrangements must be administered in a nondiscriminatory manner").

ployers in those trades are permitted (but not required) by Section 8(f) of the Landrum-Griffin Act, 29 U. S. C. § 158(f), to negotiate exclusive hiring hall agreements for the employment of construction workers. *See Fruin-Colnon Corp., supra; Morrison-Knudsen Co., Inc. v. NLRB*, 275 F. 2d 914 (2nd Cir. 1960), *cert. denied*, 366 U. S. 909 (1961). A contrary holding would allow employers to use exclusive hiring halls as shields against discrimination that is reflected in their own workforces. Defenses of that sort have long been rejected in Section 1981 and Title VII cases. *Sears v. Atchison, Topeka and Santa Fe Railway Co.*, 25 [CCH] EPD ¶ 31,621, at 19,610 (10th Cir. 1981); *Myers v. Gilman Paper Corp.*, 544 F. 2d 837 (5th Cir.), *cert. dismissed*, 434 U. S. 801 (1977); *Robinson v. Lorillard Corp., supra; Johnson v. Georgia Highway Express, Inc.*, 417 F. 2d 1122 (5th Cir. 1969). Similarly, claims by employers that they acted in good faith, or lacked knowledge of the illegality of their employment practices, have been consistently rejected. *See, e.g., Albermarle Paper Co. v. Moody*, 422 U. S. 405, 417-18 (1975). *Accord Owen v. City of Independence*, 445 U. S. 622, 651-52 (1980) (holding municipalities strictly liable under Section 1983 regardless of whether they acted in good faith); *Gurmankin v. Costanzo*, 626 F. 2d 1115, 1123 (3d Cir. 1980) (holding a school district liable under the Fourteenth Amendment regardless of its lack of knowledge of the illegality of its employment practices).

The non-delegable nature of the duty not to discriminate cuts across the fabric of anti-discrimination law. For example, courts have upheld the principle in housing discrimination cases despite factual findings that the owners of the property lacked knowledge of their agents' intentional discrimination. *See, e.g., Phiffer v. Proud Parrot Motor Hotel*, 648 F. 2d 548 (9th Cir. 1980); *Marr v. Rife*, 503 F. 2d 735 (6th Cir. 1974); *Harrison v. Otto G. Heinzeroth Mortgage Co.*, 430 F. Supp. 893 (N. D. Ohio 1977).

Similarly, the Fourteenth Amendment's prohibition against intentional discrimination, *see, e.g., Washington v. Davis,* 426 U. S. 229 (1976), has been applied to hold state agencies liable for the discrimination of private lessees regardless of the lack of control or knowledge by the state. *Burton v. Wilmington Parking Authority,* 365 U. S. 715, 725 (1961) (". . . no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them."). *See also Derrington v. Plummer,* 240 F. 2d 922 (5th Cir. 1956), *cert. denied sub nom. Casey v. Plummer,* 353 U. S. 924 (1957) and *Coke v. City of Atlanta,* 184 F. Supp. 579 (N. D. Ga. 1960).

The conceptual underpinning of these cases is the premise that the guarantee of racial equality would be meaningless if the duty not to discriminate could be delegated. Granting immunity to the party upon whom the obligation is imposed—whether a state or a private party—would effectively nullify the obligation itself. *Ex parte Virginia,* 100 U. S. 339, 343 (1879). Here, it is undisputed that minorities were denied their right under Section 1981 to work for the class of employers on the same basis as white operating engineers. The Petitioners assert that they cannot be held responsible for that discrimination since it was perpetrated by their hiring hall agent. But, as the District Court held:

> Employers cannot be permitted, collectively or individually, to use the union as a shield and become oblivious to discriminatory practices whose true harm is revealed in the composition of their own employees. It is still the employer who contracts to hire individuals, even in a hiring hall setting, and that employer should not be free from all responsibility to take steps to alleviate discrimination when found simply because he may be blind to the racial composition

of the pool from which workers are referred. Injunctive remedial relief should quite properly be available against such an employer or employers to eliminate discrimination when found.

(JA. 194-95).

B. The District Court Correctly Adjudicated the Liability of the Defendant Class by Analyzing the Collective Workforce of all the Employers

Several Petitioners challenge the District Court's decision at Stage I to analyze the industrywide workforce for operating engineers rather than each employer's individual workforce statistics.[15] The arguments of these Petitioners are both procedurally and substantively flawed.

Procedurally, Petitioners have blurred the fundamental distinction between Stages I and II of the litigation. Pursuant to the District Court's bifurcation order, Stage I focused on classwide issues only. The resolution of those issues required the District Court to examine the impact of the hiring hall's discrimination on the industry as a whole to determine the extent of the harm caused minorities by the employers' collective and exclusive delegation to Local 542 of the authority to admit and refer workers within the craft. For that reason, no determinations were made at Stage I with respect to the victim status of individual members of the plaintiff class (JA. 93-4) or the liability of individual members of the defendant class (JA. 132, 196).[16]

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15. *See, e.g.*, Petition of United Engineers & Constructors, Inc., at 14-16; Petition of Bechtel Power Corporation, at 16-17.

16. Similarly, the District Court declined to make any determinations at Stage I with respect to the named representatives of the defendant subclasses. "I refuse to treat Glasgow separately from the other parties to the contract. Likewise, I will not treat the associations separately." (JA. 132).

The decision to bifurcate the case was made pursuant to Rule 42, Fed. R. Civ. P., and Section 4.12 of the Manual for Complex Litigation. It represented a management device designed to make the litigation less cumbersome. *Sledge v. J. P. Stevens & Co., Inc.*, 585 F. 2d 625, 637 n. 25 (4th Cir. 1978), *cert. denied*, 440 U. S. 981 (1979). That decision, especially in light of the complexities of the litigation, cannot be characterized as an abuse of discretion. *Accord International Brotherhood of Teamsters v. United States*, 431 U. S. 324, 361 (1977).[17]

But even if the collective liability of the employers were not controlling, each employer individually violated Section 1981 regardless of the racial composition of its own workforce. This becomes evident when the language of Section 1981 is juxtaposed against the facts of this case. Section 1981 requires each employer to provide "all persons" with the "same right [to] make and enforce contracts . . . as is enjoyed by white citizens." It is undisputed in this case that minorities did not have the same right as whites to contract for work as operating engineers. *Each* employer is responsible for that discrimination because *each* adhered to a collective bargaining agreement that required minorities to rely on a union that practiced intentional racial discrimination. As a result, hundreds of minorities were denied both union affiliation *and* the opportunity to work for *any* employer in the defendant class. No employer hired them because their agent, Local 542 (JA. 191), denied them entry into the industry solely on account of their race.

It is no answer to suggest that the violation of the rights of these minorities is somehow negated because a

17. In fact, once the decision to bifurcate was made, it would have been improper to make any individualized determination at Stage I. *Pettway v. American Cast Iron Pipe Co.*, 576 F. 2d 1157, 1210 (5th Cir. 1978), *cert. denied*, 439 U. S. 1115 (1979).

given employer may have been referred *other* minorities by Local 542. Section 1981 guarantees the rights of "all" minorities, and "[i]t is beyond cavil" that the employer's duty is "to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workforce." *Furnco Construction Corp. v. Waters*, 438 U. S. 567, 579 (1978) (emphasis in original). *See also Cross v. United States Postal Service*, 639 F. 2d 409, 414 (8th Cir. 1981), and *EEOC v. Greyhound Lines, Inc.*, 635 F. 2d 188, 192 (3d Cir. 1980).

II. The District Court Properly Certified the Defendant Class Pursuant to the Provisions of Fed. R. Civ. P. 23(b)(2).

The three employer Petitioners contend that the District Court committed legal error by certifying the defendant class pursuant to the provisions of Rule 23(b)(2) of the Federal Rules of Civil Procedure.[18] They claim that

18. These Petitioners also contend that the District Court lacked personal jurisdiction over the members of the defendant class. That argument was properly rejected (JA. 211-12) since service of the complaint and summons on unnamed defendant class members is unnecessary so long as the named defendant is properly served and adequately represents the class. *See, e.g., Smith v. Swormstedt*, 57 U. S. 288 (1853); *Hansberry v. Lee*, 311 U. S. 32 (1940); and Z. Chafee, *Some Problems of Equity*, 231 (1950) ("[F]ormal service of process is out of the question; that would defeat the chief advantage of a class suit.").

In addition, the Petitioners contend that Rule 23(a)'s requirements of commonality, typicality and adequacy were not satisfied. However, in light of the industrywide nature of the hiring hall system, and the limited nature of the defendant class issues litigated at Stage I, the District Court was clearly correct in finding that all the requirements of Rule 23(a) were met (JA. 198-202). It should be noted, moreover, that subsequent to

defendant class actions can never be certified under (b)(2) because linguistic problems make it impossible for plaintiffs to be "the party opposing the class".[19] If the class was maintainable at all, Petitioners assert that it should have been certified under Rule 23(b)(3) to enable them to opt out of the litigation.[20]

Petitioners' construction of Rule 23(b)(2) is patently incorrect.[21] Rule 23 itself explicitly authorizes both plaintiff and defendant class actions. It provides in its opening sentence: "One or more members of a class may *sue or be sued* as representative parties on behalf of all . . ." (emphasis added). Surely if the drafters of Rule 23 had de-

18. (Cont'd.)
the entry of its Judgment and Decree, the District Court granted the motion of Petitioners United Engineers and Constructors, Inc. and Bechtel Power Corporation to decertify the defendant class for purposes of Stage II of the litigation. That ruling, predicated on the presumed unmanageability of the class at Stage II, is not now before this Court, but Respondents do intend to appeal it to the Court of Appeals at the appropriate time.

19. Rule 23(b)(2) class actions are appropriate where:

> (b)(2) *the party opposing the class* has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief to the class as a whole (emphasis added).

20. The clear impact of certification under (b)(3) would be to effectively deny certification altogether. *Accord*, Z. Chafee, *Some Problems of Equity*, *supra* at 260 ("[An invitation to be a defendant is not tempting."). *See also* 1 H. Newberg, *Class Actions*, § 1148 at 256 (1977) ("The unconditional right of class members to 'opt out' of a Rule 23(b)(3) class action makes (b)(3) classes unsuitable as vehicles for defendants' class actions.").

21. The Court need not address the issue of whether defendant class actions are contemplated by Rule 23(b)(2) because certification of the defendant class in this case would also have been appropriate under Rule 23(b)(1)(A). See JA. 140.

sired to restrict the prosecution of defendant class actions, they chose inappropriate language to express their intentions.

In addition, the Advisory Committee's Note to Rule 23(b)(2) creates no distinctions between plaintiff or defendant class actions. 39 F. R. D. 69, 102 (1966). To the contrary, the Note specifically states, without reservation, that civil rights cases are particularly appropriate for (b)(2) treatment. *Id.* And certainly nothing in the phrase "the party opposing the class" suggests that (b)(2) actions are exclusively limited to plaintiff classes. Once again, if the intent was to foreclose defendant class actions under Rule 23(b)(2), more explicit language, with an accompanying discussion, would have been expected from the drafters.

Petitioners do not dispute the fact that many defendant classes have been certified under Rule 23(b)(2). *See, e.g., Redhail v. Zablocki,* 418 F. Supp. 1061, 1066 (E. D. Wisc. 1976) (three judge court), *aff'd. on other grounds,* 434 U. S. 374 (1978) (defendant class of county clerks); *Washington v. Lee,* 263 F. Supp. 327, 330 (M. D. Ala. 1966), *aff'd.,* 390 U. S. 333 (1968) (defendant class of county sheriffs); *Marcera v. Chinlund,* 595 F. 2d 1231, 1238-40 (2nd Cir.), *judgment vacated on other grounds,* 442 U. S. 915 (1979) (same); *United States v. Trucking Employers, Inc.,* 75 F. R. D. 682, 686-694 (D. D. C. 1977), *class decertified on other grounds,* 20 [BNA] FEP Cases 342 (D. D. C. 1979) (nationwide defendant class of trucking companies); *Thompson v. Bd. of Educ. of Romeo Schools,* 12 [BNA] FEP Cases 1700, 1710-11 (W. D. Mich. 1976) (defendant class of school boards). Moreover, in *Washington v. Lee, supra,* 390 U. S. at 333, this Court specifically rejected the very argument now raised by Petitioners. *See also* Note, *Defendant Class Actions,* 91 Harv. L. Rev. 630, 633 (1978).

The only decision relied upon by Petitioners, *Paxman v. Campbell*, 612 F. 2d 848 (4th Cir. 1980), *cert. denied*, 445 U. S. 635 (1981), is clearly distinguishable. In *Paxman*, plaintiffs successfully challenged certain maternity leave policies that were in effect in many Virginia school districts. A defendant class was certified by the District Court, 390 F. Supp. 442, 447-48 (E. D. Va. 1975) but, on appeal, the Fourth Circuit reversed the class certification. 612 F. 2d at 854. In footnote 9 of its opinion, the court explained why a defendant class was inappropriate:

> In this case . . . more than 130 different school boards were free to adopt maternity leave policies of entirely unknown differences or similarities. *It is uncontradicted that there was no statewide policy in force, centrally directed or otherwise.*

612 F. 2d at 854 n. 9 (emphasis added).

Paxman, of course, is a vastly different case than this one. Here, there was an industrywide exclusive hiring system to which all members of the defendant class were parties. Each class member obligated itself to accept referrals from one source only, Local 542,[22] and the union, in exercise of the delegation granted it by the employers, engaged in a pattern and practice of racial discrimination against qualified minorities.

Finally, not only have the requirements of Rule 23 (b)(2) been satisfied, but in addition, as the District Court

22. Minorities, like the employers, were compelled to rely on Local 542 for referrals. Therefore, plaintiffs, to use the literal language of Rule 23(b)(2), are the "party opposing the class" because it was only by virtue of the employers' exclusive delegation to Local 542 that minorities were discriminated against in entry and referrals to jobs. Plaintiffs oppose the defendant class precisely because of that delegation and discrimination.

concluded (JA. 205), there is a heightened need for (b)(2) certification in this case because of the impossibility of providing plaintiffs with make-whole injunctive relief against any particular defendant. See *Moody, supra,* 422 U. S. at 421. See also *Sindell v. Abbott Laboratories,* 26 Cal. 3d 588, 607 P. 2d 924, *cert. denied,* 449 U. S. 912 (1980). In the absence of an industrywide class of employers bound to an injunctive decree, the District Court's remedial objective of ensuring minorities their fair share of work within the Union's jurisdiction would be impossible of attainment (JA. 221).

CONCLUSION

Respondents respectfully submit that Petitioners have failed to sustain their burden of establishing under Rule 17 that there are special and important reasons why the Writ should be granted. The decision of the Third Circuit, affirming the liability of the defendant class and the entry of a moderate injunctive decree designed to remedy any further racial discrimination against minorities, was proper and necessary in light of the industrywide hiring hall system that the associations and employers adhered to with Local 542. The Writ should be denied.

Respectfully submitted,

LeRoy S. Zimmerman
Attorney General
Margaret Hunting
Joel M. Ressler
Deputy Attorneys General
Office of Attorney General
Strawberry Square, 16th Fl.
Harrisburg, Pennsylvania
17120
(717) 787-5050
Attorneys for Respondent Commonwealth of Pennsylvania

Harold I. Goodman
Germaine Ingram
Community Legal Services, Inc.
Sylvania House
Juniper and Locust Streets
Philadelphia, Pennsylvania
19107
(215) 893-5354
Attorneys for Individually Named and Class Respondents

Supplemental Brief

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Nos. 81-280, 81-330, 81-331, 81-332 and 81-333

In the Supreme Court of the United States

October Term, 1981

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.; THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA; THE UNITED CONTRACTORS ASSOCIATION; GLASGOW, INC.; BECHTEL POWER CORPORATION; and UNITED ENGINEERS AND CONSTRUCTORS, INC.,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS et al.,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

LeROY S. ZIMMERMAN
Attorney General
MARGARET HUNTING *
JOEL M. RESSLER
Deputy Attorneys General
Office of Attorney General
Strawberry Square
16th Floor
Harrisburg, Pa. 17120
(717) 787-5050
Attorneys for Respondent, Commonwealth of Pennsylvania

HAROLD I. GOODMAN *
GERMAINE INGRAM
Community Legal Services, Inc.
Sylvania House
Juniper and Locust Streets
Philadelphia, Pa. 19107
(215) 893-5354
Attorneys for Individually Named and Class Respondents

* Counsel of Record

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

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ARGUMENT

The Certiorari Petitions Do Not Present the Issue of Whether or Not Section 1981 Prohibits Only Intentional Discrimination

At pages 10 and 11 of our Brief in Opposition, Respondents argued that this case does not involve the issue of whether 42 U.S.C. §1981 requires proof of intentional racial discrimination. We pointed out in footnote 13, at page 11, that the Third Circuit was separately considering that issue in *Croker v. The Boeing Company,* Nos. 80-1569/70.

Croker was argued *en banc* the same day oral argument was heard in this case. The decision in *Croker* was not rendered, however, until September 30, 1981—after the Petitions and Brief in Opposition were filed here. By a five-four vote, the Third Circuit held in *Croker* that Section 1981 does require proof of intentional discrimination. That decision indisputably corroborates Respondents' position that the Section 1981 issue in this case is materially different from the Section 1981 issue presented in *Croker.* For here, unlike *Croker,* it is undisputed that classwide intentional discrimination was practiced by Local 542 and the JATC. The legal question posed by the Petitions for Certiorari is whether that intentional discrimination was properly imputed to the defendant class of employers and contractor associations.

Petitioner General Building Contractors Association, Inc. ("GBCA") has attempted to blur the distinction between this case and *Croker* by arguing in its Supplemental

Memorandum that ". . . the Third Circuit *en banc* by different groups of judges and with no explanation has interpreted 42 U.S.C. §1981 in opposite ways in two cases." (Supplemental Memorandum, at 1.) This misrepresentation only serves to underscore the lengths to which GBCA seems prepared to go to entice the Court into granting the writ. First, *Croker* and this case were not decided by "different groups of judges." Both were decided by the Third Circuit *en banc,* although in this case Judges Adams, Higginbotham and Sloviter recused themselves. Second, since oral argument in this case and in *Croker* occurred on the same day, it was clear to the Third Circuit, as it was to the parties, that the two cases involved substantively different legal questions developed over materially different factual records. Here, it was unnecessary to decide the reach of Section 1981 because Respondents beyond any doubt satisfied the more rigorous standard of intentional discrimination. In *Croker,* by contrast, the evidence showed only adverse impact; the Third Circuit was, therefore, compelled to decide whether a Section 1981 violation was established by that evidence or whether the statute instead required proof of purposeful racial discrimination.

There is, therefore, no inconsistency between *Croker* and this case. To argue that there is—as GBCA does—suggests that the Judges of the Third Circuit lacked either the perception or recollection to realize that they had decided the same issue only months earlier in a case which was argued the very same day. Surely, had the Third Circuit decided in the instant case that proof of intentional discrimination was unnecessary to establish a Section 1981 violation, the dissenters in *Croker* would have seized upon that prior holding as an additional predicate for their vigorous critique of the majority holding. Yet, nowhere in any

of the opinions in *Croker* is there so much as a passing reference to this case. The absence of any such reference is conclusive evidence that the Third Circuit resolved a different legal issue in this case when it held that GBCA and the other Petitioners were properly held liable under Section 1981.

Nor is there any support for GBCA's labored argument that the Third Circuit created one rule of liability in this case for employers and associations relying on exclusive union hiring halls, and a divergent one in *Croker* for all other employers (*see* GBCA's Supplemental Memorandum, at 2). There is neither a passage nor a reference in *Croker* to indicate that the Third Circuit created two such incompatible rules of application for Section 1981. It is not surprising, therefore, that GBCA was unable to cite a page or reference in either of the Third Circuit opinions to support its singular contention that it is the victim of a double standard.

CONCLUSION

GBCA has neither advanced its own nor served the Court's interests by contending that the decision in *Croker* "makes a grant of certiorari here even more imperative" (see Supplemental Memorandum, at 1). To the contrary, *Croker* reinforces the differences between the two cases, and emphasizes that the Third Circuit never intended to use this case to decide whether Section 1981 prohibited only intentional racial discrimination. The decision below, therefore, presents no conflict among the authorities, and no special reason for granting certiorari. The writ should be denied.

Respectfully submitted,

LEROY S. ZIMMERMAN
Attorney General
MARGARET HUNTING
JOEL M. RESSLER
Deputy Attorneys General
Office of Attorney General
Strawberry Square,
16th Floor
Harrisburg,
Pennsylvania 17120
(717) 787-5050
Attorneys for Respondent Commonwealth of Pennsylvania

HAROLD I. GOODMAN
GERMAINE INGRAM
Community Legal Services, Inc.
Sylvania House
Juniper and Locust Streets
Philadelphia,
Pennsylvania 19107
(215) 893-5354
Attorneys for Individually Named and Class Respondents

Petitioner's Reply Brief

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No. 81-280

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

JOHN G. KESTER *
JOHN J. BUCKLEY, JR.
Hill Building
Washington, D.C. 20006
Attorneys for Petitioner

Of Counsel:
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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OCTOBER TERM, 1981

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Petitioner,

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COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

The issue presented to this Court is whether Petitioner GBCA—a non-employing trade association that the district court found simply signed a nondiscriminatory collective bargaining agreement as bargaining agent for about eighty employers—can on that basis alone be held liable under the 1866 Civil Rights Act, 42 U.S.C. § 1981, for a Union's discrimination that violated or occurred independently of that agreement. The judgment below held Petitioner liable—in spite of also finding that Petitioner did not know of, or even have reason

to know of, the Union's discrimination—on the theory that § 1981 does not require any proof of a defendant's intent to discriminate.

Five petitions for certiorari are now before this Court:

> Petitioner, as well as the petitioners in No. 81-331, are not and never have been employers of operating engineers. They are trade associations, who simply signed the valid collective bargaining agreement that the Union ignored or violated. Nevertheless they were held liable.
>
> The Petitioners in Nos. 81-330, 81-332, and 81-333 are employers of operating engineers who, despite their lack of knowledge or involvement in the discrimination, were also held liable. (Petitioners in Nos. 81-330 and 81-333 raise in addition class-action questions peculiar to their own situation.)
>
> The Union and the JATC apprenticeship committee—the only parties below found to have discriminated—have not sought certiorari.

For the court below to have found the *employers* liable under § 1981 without proof of intent, knowledge or reason to know of discrimination was in conflict with the law in other circuits. For it to hold *Petitioner, a non-employer*, liable in such circumstances is an even further extension—not only is the holding a departure from other § 1981 cases, but indeed it approaches the bizarre.

Respondents wrote their brief in opposition as if Petitioner were not in the case. Respondents avoid addressing Petitioner's situation by lumping all five petitions for certiorari together, and then devoting the entire argument section of their brief [1] to a discussion of *employers*.

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[1] Brief for Respondents, pp. 10-22. Petitioner and the other associations are scarcely mentioned.

Respondents thus try to ignore the present petition and the particular anomalies of holding liable Petitioner, a party that not only had no knowledge of the discrimination—but as a non-employer would have had no power to remedy the discrimination even if Petitioner had known about it. Liability without fault for Petitioner certainly cannot be based on an agency theory, because Petitioner was never a master or a principal. Nor can Petitioner be held liable on a theory of employer's duty, because Petitioner was never an employer and never controlled any employer. "Unless the law is—contrary to holdings of six other circuits—that § 1981 imposes liability without fault and without proof of intent on one who neither knew of nor had power to correct discrimination, then there is no way to hold Petitioner liable at all.

Petitioner submits that the imposition of § 1981 liability without proof of discriminatory intent by Petitioner is plainly incorrect, is in conflict with prior decisions of this Court, and warrants plenary review if not summary reversal.

1. Although conceding that the district court held that § 1981 does not require proof of discriminatory intent, Respondents nevertheless contend that the correctness of that holding is not at issue because Local 542 was found to have intentionally discriminated in its hiring hall. They argue that the only question is whether the Union's discrimination was in turn properly "imputed" to Petitioner and the other contractor associations.

Of course, this argument ignores the fact that the district court "imputed" § 1981 liability to Petitioner only because it thought, erroneously, that § 1981 did not require proof of a defendant's discriminatory intent. (A. 13a, 20a.)[2] Indeed, in fashioning what it described

[2] References cited to "A." refer to pages of the Addenda bound with the petition for certiorari, No. 81-280.

as a form of "vicarious" liability, the district court repeatedly invoked the theme that § 1981 made the associations and employers liable for discrimination committed by Local 542 irrespective of their intent (A. 15a, 19a, 20a) and "whether or not the employers and associations knew or should have known" of the Union's discrimination (A. 14a). In concluding that Petitioner was liable even though the labor contract itself was lawful and nondiscriminatory, the district court held that Petitioner by signing the agreement acquired a "duty to see that no discrimination takes place outside the agreement." (A. 20a.)

The district court expressly stated that it relied upon cases decided "under § 1981 with the view (as accepted here) that liability requires no proof of purposeful conduct on the part of any of the defendants" and that "these cases give analytical support to plaintiffs' vicarious liability theory in the present case" (A. 20a). Again, the district court stated that "the finding of liability was that the contractors' associations and the contractor-employers were not aware of the discriminatory entrance and referral practices of the Local's hiring hall, or even that they should have been aware of such discriminatory acts." (A. 31a.)

The district court candidly acknowledged that it could find "no case" imposing liability on a trade association or anyone else in such circumstances (A. 14a) and further conceded that the only decisions on point rejected liability (A. 15a, 17a). The court of appeals *en banc* divided evenly on the question. (A. 2a.)[3]

Respondents' brief cites no case justifying imposition of § 1981 liability in the absence of a defendant's discriminatory intent and, indeed, abandons any explicit reliance on or references to what the district court called

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[3] Such division is itself significant indication of the importance of the issue presented. By contrast, on the question of the Union's liability, the court of appeals affirmed unanimously.

its "vicarious" liability theory. Rather, Respondents' new theory is that § 1981 imposes a "non-delegable duty" not to discriminate, which Respondents acknowledged in the court of appeals means strict or "absolute liability" for discrimination. (See petition for certiorari, at 8.) Respondents speak of "delegating" entry and referral functions to the Union's hiring hall. What Respondents never explain is how "delegation" of employment functions has anything to do with Petitioner, a non-employer. Respondents' brief is devoted entirely to arguments about an *employer's* asserted "strict liability" duty concerning its own workforce. The Respondents are totally at a loss to explain how even their new theory could create a duty for a *trade association* like Petitioner that has no engineer workforce and simply negotiated a lawful labor contract and then disappeared from the scene.

2. Respondents strive to mask their unprecedented position through vague citations to cases that involve collective bargaining agreements that were themselves found to be discriminatory and hence unlawful under statutes that, unlike § 1981, do not require discriminatory intent.[4] Most often, the citations do not relate at all to the subject matter of this case.[5] In any event, not even Respondents claim that any other court has found liability on the facts involved here. Finally, Respondents refer to housing discrimination cases holding property owners responsible on a *respondeat superior* theory for intentional discrimination by their employees

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[4] *E.g., Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) (Title VII); *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837 (5th Cir.), *cert. dismissed sub nom. Local 741, IBEW* v. *Myers*, 434 U.S. 801 (1977); *Carey* v. *Greyhound Bus Co.*, 500 F.2d 1372 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir), *petition for cert. dismissed*, 404 U.S. 1006 (1971).

[5] *E.g., Fruin-Colnon Corp.* v. *NLRB*, 571 F.2d 1017 (8th Cir. 1978).

and sales agents. This ignores the fact that Local 542 was not found to be the employee or agent of Petitioner. (Indeed, any attempt by Petitioner to exert a "master's" or "principal's" control over the "servant" union would have violated Sections 8(a)(1) and 8(a)(2) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (2).) Moreover, Petitioner functioned not as a "principal" but as a bargaining agent for about eighty contractors in negotiating a non-discriminatory labor contract in 1965. Petitioner's principals, the contractors, were similarly found not to have discriminated, nor to have been aware of Local 542's discrimination, nor to have had reason to have been aware of that discrimination. (A. 14a.)

3. Respondents' concealed reference to a "vicarious" liability theory only demonstrates all the more the need for review by this Court. Here Petitioner had no right to control either Union or employers, so how a vicarious responsibility could even be hypothesized is puzzling. In *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), this Court rejected a "vicarious" liability theory for 42 U.S.C. § 1983 even where there was an agency relationship. Respondents present no argument justifying vicarious liability for § 1981—much less one that applies to make Petitioner, a party to a non-discriminatory labor contract, liable for subsequent discrimination by a Union *in violation of that agreement and in the absence of any knowledge by Petitioner of that discrimination.*

No matter what the label, the court below created a startling new liability theory under which a signatory to a collective bargaining agreement becomes strictly liable for the subsequent wrongs of all other parties to the contract. It devised an obligation which goes far beyond simply a duty not to engage in purposeful discrimination, or even (as only a minority of lower courts have held) a duty not to engage in conduct having a racially-

disparate impact. Instead, it imposed an absolute duty on Petitioner's part to prevent *others* from engaging in discrimination, even where Petitioner neither knew, nor should have known, of such discrimination.[6]

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[6] Respondents' attorneys on other occasions and for other purposes have conceded, indeed trumpeted, the novelty of the judgment below. In seeking from Petitioner and others an attorneys' fees award exceeding $1,000,000, counsel for Respondents have told the district court that they should receive an extra bonus because the holding below is "unique":

> "In terms of rights gained by class members, and favorable legal precedent achieved on their behalf, this case has accomplished a fundamental restructuring of the entire operating engineers craft in this part of the country. Whether the Court analyzes the results achieved at the procedural, substantive or remedial levels, they are unparalleled." Plaintiffs' Brief in Support of Their Motion for an Award of Counsel Fees and Costs, district court, at 23.

They go on to note that

> "[B]y way of illustration only, some of the more complex and novel legal issues included:
>
> (a) Use of a defendant class of employers *and contractor associations* in order to obtain a liability opinion and a remedial Decree against the entire operating engineers craft . . . ."
>
> * * * *
>
> (e) Applicability of respondent [*sic*] superior to hold the class of employers *and trade associations* injunctively liable for the pattern and practice of discrimination of their exclusively delegated union hiring hall agent." *Id.* at 37-38 (emphasis supplied).

At that point Respondents' attorneys' fees petition quotes these words from the district court opinion, A. 14a:

> "Although no case has been found which imposes civil rights liability on the employer or association in these precise circumstances . . . ."

The fee petition concludes that

> "The requirement of counsel to prevail ultimately on these complex and novel factual and legal issues . . . makes this case unique . . . ." *Id.* at 39.

4. The Respondents do not challenge the district court's finding that they failed to prove any knowledge or involvement by Petitioner in the Union's discriminatory conduct. The district court's opinion is pellucid in declaring that Petitioner was not shown to have discriminated, nor to have known, nor to have had reason to know, of the discrimination by others. (A. 14a, 31a.) Respondents filed no appeal from the district court's decision rejecting their claim of intentional discrimination and do not argue that the district court's factual finding was clearly erroneous.

Nevertheless, Respondents attempt to mislead this Court by unfairly insinuating the possibility of Petitioner's complicity. Thus Respondents' brief asserts that in 1963 some contractor associations accused Local 542 of racial discrimination; what it fails to point out is that there was absolutely no proof that Petitioner either made or knew about this accusation, or even that the accusation if it occurred related to the discriminatory practices involved in this case.[7] The trial testimony showed that the charge was in fact either never made, or, whoever made it, was made during the "give and take" of heated negotiations over a new labor contract.[8] The short answer is that in specifically finding that the contractor associations lacked knowledge of the Union's discrimination, the district court rejected Respondents' present contention and found the incident to be of no probative consequence.

Respondents' brief also incorrectly asserts that the contractor associations were jointly responsible with the Union for inaccurate information on minority member-

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[7] Appendix, Court of Appeals, at 3062. This 1963 incident would have occurred beyond the period of the six-year statute of limitations applied by the District Court.

[8] Appendix, Court of Appeals, at 2191; Trial transcript at 12038-40.

ship in Local 542 which was contained in an affirmative action program agreement submitted to the federal government in 1968. Again, Respondents fail to note that this accusation pertained to a federal affirmative action plan and had nothing to do with the hiring hall discrimination involved here.[9] Moreover, the district court specifically found that the contractor associations did not know that the Union's figures were inaccurate.[10] In any event, this is another red herring, for the district court regarded the matter as irrelevant to the present question of Petitioner's knowledge of or involvement in the Union's discriminatory operation of the hiring hall—knowledge which it found to be non-existent.[11]

---

[9] The undisputed evidence at trial showed that it was the Union, and not the contractor associations, which had sole access to the Union membership lists and which compiled the figures in question. (Appendix, Court of Appeals, at 141-145, 2379.) Petitioner was not even an original party to are agreement, which had been previously prepared and executed by others.

[10] As the district court stated, "I do not on the present record find actual knowledge of the formal error in figures or of union discrimination generally." (Appendix to petition for certiorari, No. 81-280, at 168.) Instead, the Court characterized the associations as "reckless participants" on a theory that they should have acted like an "accounting firm" in signing the agreement.

[11] In another factual misrepresentation, Respondents assert that the associations participated in programs financed by federal and state governments that, in their words, "failed to provide minorities with the training and upgrading to which they were entitled." (Brief for Respondents, at 6.) Respondents then cite parts of the district court's opinion dealing with a state- and federally-financed training program, but fail to note that the district court found that "none of the associations . . . were parties to the agreement or responsible for the . . . endeavor." (Appendix to petition for certiorari, No. 81-280, at 26.) The district court referred only in a footnote to the associations' own training program aimed specifically at helping minorities, and observed simply that the program had not been as successful as hoped. (*Id.* at 28 n.15.) The district court found no discrimination—nor could it have, since these were special programs *for* minorities.

In sum, as the district court concluded, there was a failure of proof that Petitioner was aware, or even should have been aware, of the Union's violations of the contractually-agreed-upon hiring hall rules or of the Union's discriminatory conduct. Those Union and JATC violations are all that was proven in this case.

The question remains, therefore, whether Petitioner, a non-employing trade association, simply on the basis of its status as a party to a lawful collective bargaining agreement, can be held liable under the 1866 Civil Rights Act for the Union's subsequent discriminatory acts, where those acts are independent of and/or in violation of that agreement and where Petitioner, as the district court found, neither knew nor had reason to know of the Union's discrimination. We submit that, as practically every other case on the subject in the *Federal Reporter* has held, the answer is clearly no.

CONCLUSION

For the reasons stated herein and in the petition for certiorari, the petition should be granted.

Respectfully submitted,

JOHN G. KESTER
JOHN J. BUCKLEY, JR.
Hill Building
Washington, D.C. 20006
Attorneys for Petitioner

Of Counsel:
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

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Amicus Brief

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Nos. 81-280, 81-331, 81-332

IN THE

Supreme Court of the United States

October Term, 1981

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,
Respondents.

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA

and

THE UNITED CONTRACTORS ASSOCIATION,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,
Respondents.

GLASGOW, INC.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,
Respondents.

BRIEF OF *AMICUS CURIAE* THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETER G. NASH
1200 New Hampshire Avenue, N.W.
Washington, D. C. 20036

Attorney for Amicus Curiae

Of Counsel:
OLGETREE, DEAKINS, NASH, SMOAK,
STEWART, & EDWARDS
1200 New Hampshire Avenue, N.W.
Washington, D. C. 20036

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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I. INTEREST OF AMICUS CURIAE

This brief is in support of the petitions to this Court of Glasgow, Inc., The Contractors Association of Eastern Pennsylvania, and The United Contractors Association for writs of certiorari.

Written consent, which is submitted herewith, has been obtained from all parties for the filing of this brief.

The Associated General Contractors of America ("AGC") indeed has a vital interest in this case.

AGC is a national construction association which consists of 113 chapters in the fifty states and Puerto Rico. It has as members, and thus represents, up to approximately 30,000 business organizations engaged in, or closely related to, the construction industry, including approximately 8,400 organizations which function as general contractors. AGC members are responsible for the employment of approximately 3,500,000 workers. The construction industry annually accounts for between 8½ and 11% of the gross national product, and AGC general-contractor members perform annually approximately 80% of the total contract construction volume, amounting annually to approximately 125 billion dollars of construction.

This case could substantially disrupt the now common use of hiring-hall referral systems in the construction industry, and, as a consequence, the decisions by the courts below [1] in this case, if left undisturbed, will substantially harm the multi-billion dollar construction industry. The courts below imposed vicarious liability on contractors solely because they as they were contractually obliged to

1. The decision of the United States District Court for the Eastern District of Pennsylvania (469 F. Supp. 329) was affirmed as a result of an equally-divided *en banc* vote by the United States Court of Appeals for the Third Circuit (648 F. 2d 923).

do, employed workers referred by a union hiring hall which was operated by the union in a racially discriminatory manner. Those decisions below imposed that liability for racial discrimination on contractors despite the fact that the labor contract's hiring-hall provisions were racially neutral and despite the fact that the contractors did not commit any discrimination and had no knowledge or reason to know that any discrimination was being committed. The courts below also imposed vicarious liability on several local chapters of the AGC[2] solely because they participated in the negotiation of the nondiscriminatory hiring-hall provisions.[3] As with the contractors involved in this litigation, the associations involved neither knew nor had any reason to know of the union's discrimination.

Hiring-hall referral systems are widely used in industries throughout the United States. Indeed, this Court has approvingly commented that they in some situations "eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen in haphazard uneconomical searches by employers."[4] They are common to many crafts in the construction industry.[5] If a contractor is

2. General Building Contractors Association; The Contractors Association of Eastern Pennsylvania; The United Contractors Association; and several other associations included within a certified defendant class.

3. A contractual provision for an exclusive hiring-hall referral system is a mandatory subject of collective bargaining. *Houston Chapter, Associated General Contractors,* 143 NLRB 409 (1963), *enf'd,* 349 F. 2d 449 (5th Cir. 1965), *cert. denied,* 382 U. S. 1026 (1966).

4. *Local 357, International Brotherhood of Teamsters v. NLRB,* 365 U. S. 667, 672 (1961).

5. In the construction industry employers are virtually *forced* to use hiring halls where requested by a union, since such hiring

exposed to substantial liability [6] for union actions unknown to it and by persons over whom it has no control, it is reasonable to expect that this will make the contractor less willing to subject itself to those risks which are so necessary to the continued operation of the construction industry.

Since AGC represents such a significant portion of the major industry of construction, and since the immediate decisions of the courts below are so harmful to that industry, AGC plainly has a vital interest in this litigation, and in urging this Court to grant the pending petitions for writs of certiorari.

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halls are mandatory subjects of collective bargaining which a union may strike to obtain. Indeed, the hiring-hall provision involved in this case resulted from a ten-week strike.

6. Consider alone that the claim for plaintiffs' attorneys fees through March, 1980, is for more than $1,000,000.00. There is as yet no reliable figure for a back-pay liability stretching back to November, 1965, but plaintiffs' counsel has stated it may be as high as $30,000,000.00. The plaintiffs also are seeking punitive damages.

SUMMARY OF ARGUMENT

This Court should take certiorari jurisdiction in order to settle in a sound fashion important questions of federal law having a substantial impact on the multi-billion dollar construction industry, as well as to resolve direct conflicts of decisions between the Third Circuit and at least six other federal courts of appeals and of principles established by this Court.

ARGUMENT

I. This Court Should Now Settle the Heretofore Unsettled Substantial Questions of Federal Law Under 42 U. S. C. § 1981 Presented Herein Which Affect Millions of Workers and Annually Billions of Dollars of Construction.

The courts below did not rely upon or cite any controlling authority for their decisions that contractors and contractor associations, who did not commit any discrimination, are vicariously liable under 42 U. S. C. § 1981 for a union's racial discrimination where they neither knew nor had reason to know of that discrimination. This is so because that issue has not been ruled upon by this Court, by any federal court of appeals, or for that matter directly by any federal district court.

Instead the courts below relied, by analogy, on their misreading of a line of cases decided under the National Labor Relations Act [7] and on Restatement (2d) of Agency, § 214, which the courts below incorrectly read into § 1981.

Because of the importance of the question presented—vicarious liability under § 1981—and the lack of any direct controlling authority, this Court should now establish clear and sound controlling law.

II. The Decisions of the Courts Below Conflict With Decisions of Other Federal Courts of Appeals.

The courts below held that § 1981 does not require proof of discriminatory intent and, thus, that contractors and associations are vicariously liable under § 1981 for union discrimination in the operation of hiring halls de-

7. The leading case in this line is *Morrison-Knudsen Co., Inc. v. NLRB*, 275 F. 2d 914 (2nd Cir. 1960), *cert. denied*, 366 U. S. 909 (1961).

spite findings that they neither knew nor had reason to know of the union's discrimination.

By so holding, the courts below, including the Third Circuit, misread the standard of proof required under § 1981 and did so in direct conflict with the decisions of six other federal courts of appeals, as well as with the dictum in at least two other circuits. *City of Milwaukee v. Saxbe*, 546 F. 2d 693 (7th Cir. 1976); *Chicano Police Officer's Ass'n v. Stover*, 552 F. 2d 918 (10th Cir. 1977); *Johnson v. Alexander*, 572 F. 2d 1219 (8th Cir.), *cert. denied*, 439 U. S. 986 (1978); *Donnell v. General Motors Corp.*, 576 F. 2d 1292 (8th Cir. 1978); *Guardians Ass'n v. Civil Service Comm'n.*, 633 F. 2d 232 (2d Cir. 1980); *Grigsby v. North Mississippi Medical Center, Inc.*, 586 F. 2d 457 (5th Cir. 1978); *Detroit Police Officers' Ass'n. v. Young*, 608 F. 2d 671 (6th Cir. 1979); *Des Vergnes v. Seekonk Water Dist.*, 601 F. 2d 9 (1st Cir. 1979).

Further, in reaching their decision of vicarious liability, the courts below incorrectly relied on a line of NLRB cases involving union membership discrimination by unions in the operation of hiring halls. E.g., *Morrison-Knudsen Co., Inc. v. NLRB*, 275 F. 2d 914 (2nd Cir. 1960), *cert. denied*, 366 U. S. 909 (1961). Thus, the courts below construed these cases as imposing liability on employers for use of a discriminatory union hiring hall where the employer neither knew nor had reason to know of that discrimination. The courts below were simply wrong, for *Morrison-Knudsen* itself involved employer knowledge, and other federal courts of appeals have held that employer knowledge is necessary in such a case to impose liability on an employer. E.g., *NLRB v. Master Stevedores Association*, 418 F. 2d 140 (5th Cir. 1969) and *Lummus Co. v. NLRB*, 339 F. 2d 728 (D. C. Cir. 1964).

Therefore, the decisions by the courts below plainly are in direct conflict with these decisions, which conflict this Court now should resolve.

III. The Decisions of the Courts Below Are in Conflict With Principles Established by This Court.

In *Washington v. Davis*, 426 U. S. 229 (1976), this Court set the standard of proof for establishing a violation of the Equal Protection clause, by holding that a plaintiff must prove discriminatory motive on the part of the alleged violator.

Although *Washington v. Davis* did not involve § 1981, that opinion indicates that the standard of proof under § 1981 should be the same as that under the Equal Protection clause, and, at least three federal courts of appeals have inferred as much. *Craig v. County of Los Angeles*, 626 F. 2d 659 (9th Cir. 1980); *Guardians Ass'n. v. Civil Service Comm'n.*, 633 F. 2d 232 (2d Cir. 1980); *Chicano Police Officer's Ass'n. v. Stover*, 552 F. 2d 918 (10th Cir. 1977). Thus, the ruling of the courts below is in direct conflict with the principles established by this Court in *Washington v. Davis.*

Likewise, this Court established in *Monell v. Department of Social Services of the City of New York*, 436 U. S. 658 (1978), that there can be no vicarious liability under 42 U. S. C. § 1983. Because of the legislative relationship between § 1981 and § 1983, it should also be clear that there can be no vicarious liability under § 1981, and the contrary conclusion of the courts below is in conflict with the principles set forth by this Court in *Monell.*

CONCLUSION

It is respectfully submitted that the decisions of the courts below have a significant adverse impact on the construction industry, that they are contrary to sound principles of law established by this Court, as well as by other federal courts, and, accordingly that this Court should grant the pending writs and correct the grave error committed by the courts below.

Respectfully submitted,

PETER D. NASH
1200 New Hampshire Avenue, N. W.
Washington, D. C. 20036
Attorney for Amicus Curiae.

Of Counsel:
OLGETREE, DEAKINS, NASH, SMOAK,
STEWART & EDWARDS
1200 New Hampshire Avenue, N. W.
Washington, D. C. 20036

Petitioner's Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR PETITIONER

JOHN G. KESTER *
JOHN J. BUCKLEY, JR.
Hill Building
Washington, D.C. 20006
Attorneys for Petitioner

Of Counsel:

WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Does § 1977 of the Revised Statutes, 42 U.S.C. § 1981, impose liability without proof of intent, or even of knowledge or reason to know, for racial discrimination committed by others?

2. Does § 1977 of the Revised Statutes, 42 U.S.C. § 1981, impose liability for acts a defendant did not cause?

3. May a non-employer, which as agent for employers negotiated a lawful, nondiscriminatory collective bargaining agreement, be held "vicariously" absolutely liable under 42 U.S.C. § 1981 for a union's subsequent racial discrimination that violated that agreement—when the court found that the non-employer did not intend, did not know of, and did not have reason to know of that discrimination?

4. In such circumstances, may the non-employer be ordered to pay 10% of the remedial charges for a court-ordered program to remedy the union's discrimination?

5. May a State sue in a United States District Court for alleged violation of 42 U.S.C. § 1981, without alleging or proving any general injury to its citizens, and when individuals injured are able to sue and have in fact sued in their own right?

Parties to the proceeding in the court of appeals are:

Commonwealth of Pennsylvania;

Raymond Williams, Willie McKay, Marion J. Eaddy, Randolph Hughes, Jr., Ariel Brownlee, William Bostic, Kenneth Howard, Alpha Christmas, Ronald Richardson, Clarence Winder, Ronald Crawford, Frank Gilchrist, and all others similarly situated;

Local Union 542, International Union of Operating Engineers;

Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania and the State of Delaware (JATC);

General Building Contractors Association, Inc., Contractors Association of Eastern Pennsylvania, United Contractors Association, and all others similarly situated;

Glasgow, Inc., and all others similarly situated;

United Engineers & Constructors, Inc.;

Bechtel Power Corporation.

Pursuant to Rule 28.1, Petitioner states that it is a nonprofit corporation with no parent companies or subsidiaries; it is affiliated with the Associated General Contractors of America.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-280

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 648 F.2d 923. The opinions and judgment of the district court are reported at 469 F. Supp. 329, 488 F. Supp. 988, 502 F. Supp. 7, and 507 F. Supp. 1146. All are reproduced in the Appendix to the petition for certiorari.

JURISDICTION

The judgment of the court of appeals was entered May 19, 1981. The petition for certiorari was filed August 11, 1981, and granted October 19, 1981. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Revised Stat. § 1977, 42 U.S.C. § 1981, and other pertinent statutory and constitutional provisions are indexed and reproduced in the Addenda bound herewith.

STATEMENT

A. The Parties and Complaint.

In 1961, after a ten-week strike, Petitioner General Building Contractors Association, Inc. ("GBCA") and three other trade associations in the Philadelphia area signed a collective bargaining agreement with Local 542 of the International Union of Operating Engineers ("the Union"). GBCA was acting as bargaining agent for about 80 to 100 of the approximately 1,400 building contractors in the Philadelphia area.[1] The strike had begun because "the negotiating trade associations had resisted efforts to establish an exclusive hiring hall" that the Union would run.[2] (A. 13.) After ten weeks the employers capitulated to the Union's demand and instructed their agents to agree to the hiring hall.[3] (A. 11, 13; J.A. 294-95, 298-99.) The hiring-hall provision was racially nondiscriminatory.

GBCA is a non-profit trade association incorporated in 1891 with predecessors tracing back to 1724. It does not

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[1] The district court found that "a vast majority of the employers are not and have not been active members of the defendant associations." (A. 19; *see also* A. 18).

References herein to "A." are to the Appendix to the Petition for Certiorari in No. 81-280; references to "J.A." are to the Joint Appendix filed in consolidated cases 81-280, 81-330, 81-331, 81-332 and 81-333.

[2] Other associations that signed were the Contractors Association of Eastern Pennsylvania ("CAEP"), petitioner in No. 81-331; the Pennsylvania Excavating Contractors Association, dissolved in 1972 (A. 19, 195 n.1.); and the United Contractors Association, also a petitioner in No. 81-331, recognized as defunct by the district court on August 10, 1981. Post Decree Order No. 43.

[3] The district court found that "the hiring hall system is on its face neutral and purports to create a bona fide seniority system." (A. 19.) In 1963 there was another strike over the hiring-hall issue, and again the employers finally capitulated. (J.A. 298-99.) The hiring-hall provision continued in subsequent contracts. (A.14 n.4; J.A. 241, 255.) In 1971 a clause was added which specifically prohibited racial discrimination. (A. 16; J.A. 231.) Thereafter, GBCA ceased to be a bargaining agent. (J.A. 296-98.)

engage in construction, nor has it ever employed operating engineers. It is essentially an information clearinghouse and service organization: its activities include promoting safety standards, providing public information, compiling statistics, sponsoring social programs, and acting as a bargaining agent when requested to help negotiate collective bargaining agreements with labor unions in the building industry. (J.A. 112-13.) GBCA does not control any building contractors or any union. The Union ran the hiring hall on its own.

In 1971 this suit was filed in the United States District Court for the Eastern District of Pennsylvania by the Commonwealth of Pennsylvania and by twelve black plaintiffs who claimed to represent a class that was being discriminated against in membership, referral and hours by the Union's activities, including the way the Union operated its hiring hall. (J.A. 69-70, 72-74.) Discrimination by employers and associations was charged as well.

No allegation was made that the collective bargaining agreement was in any way unlawful. As the district court found, "plaintiffs' allegations of discrimination are not directed against the hiring hall system per se but against the union's alleged intentional refusal to follow their own hiring hall rules . . . ." (A. 19; see also A. 37, 117.) The complaint asserted causes of action against the Union under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §§ 2000e, *et. seq.*, and against all defendants under 42 U.S.C. § 1981, which provides that all persons shall have the same right to make contracts as is enjoyed by white citizens. The complaint also alleged that the defendants had conspired to deny equal protection of the laws, in violation of 42 U.S.C. § 1985(3).[4]

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[4] Other counts alleged violations of 42 U.S.C. § 1983; Title VI of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000d, *et seq.*; § 301 of the Taft-Hartley Act, 29 U.S.C. § 185; the Pennsylvania Human Relations Act, 43 PENNA. STAT. §§ 951, *et seq.*; and the Thirteenth and Fourteenth Amendments. See A. 6, 110 n.43; J.A. 96-98.

Named as defendants were:

—(1) Local 542 of the International Union of Operating Engineers, the union that ran the hiring hall;

—(2) the Joint Apprenticeship and Training Committee ("JATC"), a body that administered apprenticeship programs for operating engineers;

—(3) Glasgow, Inc., a building contractor employing operating engineers, as representative of the class of employers; and finally

—(4) as representatives of a class of associations, GBCA and three other associations, which did not employ any operating engineers but which had as agents signed the 1961 collective bargaining agreement. (J.A. 71-72.)

The district court, Honorable A. L. Higginbotham, J., allowed the suit as a class action on behalf of black operating engineers and would-be operating engineers,[5] and also certified a defendant class (as later redefined) under Rule 23(b)(2), Fed.R.Civ.P., consisting of two defendant subclasses:

> "(a) All employer *associations* who have been parties to a collective bargaining agreement with defendant Local 542 at any time between November 8, 1965, and the date of this decree [August 8, 1979]; and
>
> "(b) All *employers* who have been parties to a collective bargaining agreement with Local 542 and who hired at least one operating engineer affiliated with Local 542 at any time between November 8, 1965, and the date of this decree." (J.A. 334.) (Emphasis supplied.)

---

[5] J.A. 118. The plaintiff class, as redefined after the trial, is set forth at J.A. 333.

B. Findings of Fact.

The district court after trial [6] found first that "the hiring hall system is on its face neutral and purports to create a bona fide seniority system." (A. 19.) The court then found that the *Union* and the *JATC* had intentionally discriminated against blacks in recruitment and in the hiring hall in violation both of Title VII and 42 U.S.C. § 1981. (A. 50-51, 105, 141 n.52.) This racial discrimination the court termed "a motley fabric of arbitrary departures from the rules" of the hiring-hall agreement. (A. 99.)

However, as to the other defendants—GBCA and the other associations, and the employers—the district court found that discrimination or intent to discriminate had *not* been shown:

> "*I find that the plaintiffs have failed to prove on a preponderance of the evidence that the associations or contractors viewed simply as a class were actually aware of the union discrimination* affecting the employment of minority persons throughout the operating engineer industry in Local 542's jurisdiction. Such knowledge with actual participation in the hiring hall system would of course itself constitute intentional discrimination. *I also find that not all contractors and associations may be said as a class to have had reasonable notice of the union's discrimination* in view of the great number of contractors and the varying size and intensity of their work." (A. 142.) (Emphasis in part supplied.)

The court reiterated that

> "In the instant case, the finding of liability was that the contractors' associations and the contractor-employers were not aware of the discriminatory entrance and referral practices of the Local's hiring hall, *or even that they should have been aware* of such discriminatory acts." (A. 204.) (Emphasis supplied.)

---

[6] Trial was on the issue of liability, with damages to be determined in a later proceeding. (A. 32; J.A. 132.)

C. Conclusions of Law.

Having found

—no discrimination by GBCA,

—no *intent* to discriminate,

—no *knowledge* of the Union's discrimination,

—no *reason to know* of the Union's discrimination,

the district court then held that in spite of the foregoing findings—which no party challenged on appeal—GBCA nevertheless was liable as a matter of law.

GBCA was not charged under Title VII.[7] The court also rejected the attempt to hold GBCA vicariously liable under 42 U.S.C. § 1985(3), which prohibits conspiracies to deny equal protection of the laws or equal privileges and immunities. The court reasoned that

> "it . . . seems obvious that no per se or vicarious liability theory could be used to hold a class of employers [or associations] liable for conspiracy to commit the discrimination practiced by the union." (A. 167.)[8]

The court believed, however, that the standard of proof under § 1981 was quite different. It said that "although plaintiffs have frequently characterized their action as being based on intentional discrimination they are not limited to this standard." (A. 6.) And it rested liability

---

[7] J.A. 331. The Union and JATC were held liable under Title VII. (A. 136-138, 141 n.52.) It was the Title VII claim against the Union, the court said, that was "at the core of this class action." (A. 126.)

[8] The court also found plaintiffs had failed to prove any non-vicarious § 1985(3) violation. Though criticizing CAEP and GBCA for not independently checking Union minority membership figures supplied by the Union to a federal employee in 1968, the court found the associations had not known of any error. (A. 25.) "I do not on the present record find actual knowledge of the formal error in figures or of union discrimination generally." (A. 168.)

> "under § 1981 with the view (as accepted here) that liability requires no proof of purposeful conduct on the part of any of the defendants." (A. 155.)

In what it conceded was a holding without precedent (A. 142), the district court ruled that GBCA could be held liable for the Union's discrimination through "vicarious liability" on "an absolute liability theory." (A. 157-58, 163; see also A. 142, 153, 180.) Lack of knowledge and notice made no difference. "With respect to the theory of per se liability adopted herein there is . . . no individualized defense." (A. 172.) GBCA, the court said, simply by negotiating and signing the agreement with a hiring-hall clause acquired along with the employers a "duty to see that no discrimination takes place *outside* the agreement." (A. 158; emphasis supplied.) "[T]he state of mind of the parties, being presumed neutral, cannot establish a defense to a Title VII or § 1981 violation . . . ." (A. 157.)

The district court's lengthy opinion did not examine the history of § 1981. Instead, it relied on a later-overruled Ninth Circuit decision, from which it concluded "that a § 1981 employment discrimination claim may be proven on roughly the same basis as a Title VII claim." (A. 140).[9] It also held that this Court's decision in *Washington* v. *Davis*, 426 U.S. 229 (1976), was no bar to "equating Title VII with § 1981." (A. 140.)

> "I find that the contractors and associations are injunctively liable to the plaintiff class under § 1981 as a result of the contractual relationship to and use of a hiring hall system which in practice effectuated intentional discrimination, *whether or not the employers and associations knew or should have known.*" (A. 142.) (Emphasis supplied.)

---

[9] Citing *Davis* v. *County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated*, 440 U.S. 625 (1979), *overruled*, *Craig* v. *County of Los Angeles*, 626 F.2d 659 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981).

As analogies the court cited NLRB cases that had held employers (not trade associations) liable for hiring-hall violations they knew or should have known of; Title VII cases or those involving collective bargaining agreements that, unlike the one here, were themselves discriminatory; and cases applying the common-law doctrine of *respondeat superior* to hold a master liable for torts of a servant within the scope of employment, from which the court reasoned that "§ 1981 permits per se or vicarious liability at least as to equitable relief." (A. 168, 166.) It left no doubt that "the only basis for liability of the defendant class was vicarious liability under § 1981 . . . ." (A. 181; see also A. 200, 201, 215.)

D. Remedial Payments.

The district court's injunction and decree ordered what it called racial "quotas," A. 190, plus an extensive five-year minority job-training and notification program, administered by the district court at all the defendants' expense,[10] to run until 1984.[11] By order entered by a successor judge[12] the Union and JATC were ordered to pay 40% and 25%, respectively, of the five-year remedial program's substantial expenses, the employer class 5%, and GBCA and two other associations 10% each,[13] even though the court noted that GBCA and others "by happenstance were named defendants in this action and found liable solely under a theory of vicarious responsibility." (A. 215.)

E. Appeals.

All the defendants appealed. The plaintiffs took no cross-appeal. The United States Court of Appeals for

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[10] A. 199 n.66, 246, 254. See pp. 44-46, *infra*.

[11] A. 245.

[12] The case was reassigned on December 6, 1979 to the Honorable Louis C. Bechtle, the former presiding judge having been earlier appointed to the United States Court of Appeals for the Third Circuit. See A. 197 n.4.

[13] A. 254, 197 n.5.

the Third Circuit *en banc* unanimously (6-0) affirmed the judgment of liability of the Union and the JATC (J.A. 429.) But as to GBCA, the other associations, and the employers, the court of appeals divided 3-3. (J.A. 425.)

The plaintiffs' relief against the Union and the JATC became final when neither of those defendants sought certiorari. Petitions of GBCA, other associations, the employer class representative, and two "non-party" members of the employer class [14] were granted by this Court October 19, 1981.

SUMMARY OF ARGUMENT

Section 1977 of the Revised Statutes of 1874, 42 U.S.C. § 1981, guarantees for all persons

> "the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ."

The question is whether that old and honorable declaration causes petitioner GBCA, a non-employer trade association that as agent signed a lawful, nondiscriminatory collective bargaining agreement, to be for that fact alone held injunctively and monetarily liable—for subsequent racial discrimination by the Union in the Union's operation of the Union's hiring hall. The district court found (and no party in this Court appealed the findings), that

> (i) the collective bargaining agreement was nondiscriminatory in intent and effect;
>
> (ii) the Union's discrimination was completely in violation of, or outside the scope of, the hiring-hall rules established by that collective bargaining agreement;
>
> (iii) GBCA did not engage in purposeful discrimination or any conduct causing discrimination; and

---

[14] Respectively, Nos. 81-280, 81-331, 81-332, 81-330, and 81-333.

(iv) GBCA neither knew—nor had reason to know—nor should have known—of the Union's discrimination.

The district court nevertheless held, and the court of appeals by a tie vote affirmed, that GBCA was liable under § 1981 on a theory of "vicarious," "per se," "absolute" liability.

Section 1981 will not bear the extreme and novel interpretation that the district court imposed on it. Section 1981, in the first place, requires a plaintiff to prove intent to discriminate, as this Court has held for similar enactments in *Washington* v. *Davis*, 426 U.S. 229 (1976), and related cases. There is no evidence that the 1866 Congress that enacted the predecessor of § 1981 ever imagined it was imposing "absolute liability," A. 157, for discrimination by others. What historical evidence there is—and there is some—points exactly the opposite way, as do the words of the statute itself.

Moreover, if § 1981 is to be interpreted as enacting a private tort remedy, there is no reason not to interpret it by ordinary principles of tort law. One of those principles is causation—that a person is not liable for wrongs he did not cause. Indeed, to hold GBCA liable under the very general language of § 1981 for discrimination the court found GBCA neither caused, nor knew about, nor had notice of, would so abandon the normal rules of liability as to call the statute into question under ordinary standards of due process of law. This Court should not assume as did the district court that the Congress casually passed a law with a "theory of per se liability . . . [under which] there is . . . no individualized defense." (A. 172.)

The district court's "vicarious liability" theory was simply plucked out of the air. Nothing in the statute, its history, or past decisions supports the notion. Moreover, there is recorded a specific (and outraged) rejection of vicarious liability, even in a much more confined and safeguarded form, by the Congress of the same era. See *Monell* v. *Department of Social Services*, 436

U.S. 658, 692-93 n.57 (1978). Further, to look as the district court did for analogies in *respondeat superior* to hold a one-time *agent* liable is to turn agency law on its head. And "equating Title VII with § 1981," A. 140, is also unavailing. For the two are not equivalent, *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975), and for GBCA this is not a Title VII case. If it were, the less demanding standard of proof established by the 1964 Congress in Title VII would be balanced by the notice, limited liability and administrative safeguards that are part of that more recent law. If § 1981 made any agent signing a collective bargaining agreement automatically liable for subsequent concealed discrimination by a union, that would be remarkable social policy. But good or bad, it certainly is not to be derived from the words, history or purpose of § 1981. Nor is the money liability the district court nevertheless imposed on GBCA, even after finding GBCA a non-wrongdoer.

There is doubt, furthermore, that § 1981 applies at all to the distant kind of private relationship GBCA had in this case. The applicability of § 1981 to some sorts of private employment discrimination traces back to the 1968 decision in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, a case involving intentional discrimination by a real-estate developer under a different but related statute. *Jones* was the basis for holding that § 1981 prevented purposeful racial exclusion by a private school in *Runyon* v. *McCrary*, 427 U.S. 160 (1976). But *Jones* does not reach *every* private defendant. Moreover, the historical underpinnings of *Jones* v. *Mayer Co.* are terrifyingly weak. They should not be asked to bear the weight of extending the post-Civil-War legislation to more and more sorts of private relationships—particularly not, as here, to stretch for liability imposed not on private *action*, but rather on unknowing, unharmful private *inaction*. In asking that the *Jones* doctrine be extended, respondents are inviting this Court to "drift" into yet another of the "rather extreme interpretations of the post-Civil War Acts" that already have trou-

bled members of this Court. *Runyon* v. *McCrary*, *supra*, 427 U.S. at 186n. (Powell, J., concurring).

Finally, the individual respondents here are entitled to relief for racial discrimination. They now have obtained it, by final judgment against the wrongdoers—the Union and JATC. Pennsylvania, however, lacked standing as a plaintiff under § 1981, and its suit should be dismissed.

ARGUMENT

I. SECTION 1981 DOES NOT MAKE A NON-EMPLOYER LIABLE FOR EMPLOYMENT DISCRIMINATION BY OTHERS.

A. Section 1981 Requires Proof of Discriminatory Intent.

The district court's gloss on § 1981 was wrong. No opinion of this Court has ever even hinted that § 1981 is violated by less than intentional discrimination. This Court's decisions construing related enactments, as well as the statutory language and legislative history of § 1981, compel the conclusion that it requires proof of purposeful discrimination to establish a violation.

1. *Cases Construing Reconstruction Enactments.*

This Court never has held that any of the Reconstruction Era enactments, either constitutional or statutory, failed to require proof of intent. See *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980) (Fifteenth Amendment); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (Fourteenth Amendment): *Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979) (42 U.S.C. § 1983). "The requirement of purposeful discrimination is a common thread running through the cases . . . ." *Washington* v. *Davis*, *supra*, 426 U.S. at 253 (Stevens, J., concurring). In *Washington* v. *Davis* this Court emphasized that its decisions "have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because

it has a racially disproportionate impact." 426 U.S. at 239.

This Court has applied the intent requirement also to 42 U.S.C. § 1985(3), which like § 1981 was enacted in part to implement the Thirteenth Amendment. *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971).[15] In *Griffin* this Court explained:

> "The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102 (emphasis in original) (footnote omitted).

These cases all have dealt with conspiracies or with governmental conduct. Is private inaction to be treated more severely?

With respect to § 1981 itself, this Court in *Runyon* v. *McCrary*, *supra*, dealt with a program of intentional discrimination that rejected schoolchildren "solely because they are Negroes." 427 U.S. at 163. Every court of appeals that has ruled on the matter since *Washington* v. *Davis* has held that the statute requires proof of intent.[16]

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[15] *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), in applying 42 U.S.C. § 1982 did so with respect to "racially motivated" discrimination. 392 U.S. at 421, 426. Earlier cases appeared to conceive violations of legislation under the Thirteenth Amendment as necessarily intentional. *Cf. United States* v. *Cruikshank*, 25 Fed. Cas. 707, 712 (No. 14,897) (C.C.D. La. 1874) (Bradley, J., on circuit), *aff'd*, 92 U.S. 542 (1876) (emphasis supplied).

[16] Even the Third Circuit finally reached the same conclusion in a factual context different from the present case. *Croker* v. *Boeing Co.*, Nos. 1569/70, Sept. 30, 1981. See also *Guardians Ass'n* v. *Civil Service Comm'n*, 633 F.2d 232 (2d Cir. 1980); *Williams* v. *Dekalb County*, 582 F.2d 2 (5th Cir. 1978); *Grigsby* v. *North Mississippi Medical Center, Inc.*, 586 F.2d 457 (5th Cir. 1978); *Mescall* v. *Burrus*, 603 F.2d 1266 (7th Cir. 1979); *Johnson* v. *Alexander*, 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978); *Donnell* v. *General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978); *Craig* v. *County of Los Angeles*, 626 F.2d 659 (9th

The reasoning of this army of decisions is typified by that of the Ninth Circuit overruling the case [17] on which the district court here principally relied:

> "[T]he historical connection between § 1981 and the Fourteenth Amendment, the thrust of the Supreme Court decision in *Washington v. Davis, supra*, the complexity as well as legislative history of the statutory scheme adopted by Congress in Title VII, and the ease with which acceptance of plaintiffs' theory would allow circumvention of that scheme convince us that equal protection rather than Title VII standards apply to employment discrimination claims brought under § 1981." [18]

2. *The Statutory Language.*

The words of the statute, although not wholly unambiguous, offer some guidance. Section 1981 guarantees "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." To violate § 1981, one must interfere with someone's right to contract, by racially-motivated conduct. See *City of Memphis* v. *Greene*, 451 U.S. 100, 131 (1981) (White, J., concurring) (under same operative language of 42 U.S.C. § 1982, "purposeful racial discrimination is quite clearly the focus of the proscription"). GBCA here did nothing to interfere with anyone's right to contract.

Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); *Chicano Police Officer's Ass'n* v. *Stover*, 552 F.2d 918 (10th Cir. 1977); *Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 101 S. Ct. 3079 (1981) (dictum); *Des Vergnes* v. *Seekonk Water Dist.*, 601 F.2d 9 (1st Cir. 1979) (dictum). *But cf. Kinsey* v. *First Regional Securities, Inc.*, 557 F.2d 830, 838 n.22 (D.C. Cir. 1977) (dictum).

[17] *Davis* v. *County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated*, 440 U.S. 625 (1979).

[18] *Craig* v. *County of Los Angeles*, *supra*, 626 F.2d at 668 (footnote omitted). See also *Guardians Ass'n* v. *Civil Service Comm'n*, *supra*, 633 F.2d at 264: "in *Washington* v. *Davis*, the Supreme Court subsequently pulled the legal rug out from under" cases that held § 1981 does not require proof of discriminatory intent.

Moreover, in providing that all persons are assured the "same right" to contract "as is enjoyed by white citizens," the guarantee of § 1981 resembles the equal protection guarantee explicit in the Fourteenth Amendment and implicit in the Fifth, which has been held to require proof of purposeful discrimination. *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra; Washington* v. *Davis, supra.* In *Washington*, this Court rejected "the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation" and expressed "difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." 426 U.S. at 245.

This reasoning fully applies to § 1981. Indeed, when codified in 1874 that statute was captioned, "Equal rights under the law," and clearly was designed to ensure equal treatment of blacks and whites alike. *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295 (1976). Similar and contemporaneous guarantees of "equal" or the "same" rights should not be read to impose radically different standards of liability. Thus in *Griffin* v. *Breckenridge, supra*, this Court explained that "*the motivation requirement* [*is*] *introduced by the word 'equal'* " in § 1985(3) because it indicates a concern with racially-motivated conduct. 403 U.S. at 102 & n.10 (emphasis supplied). There is no reason to construe the word "same" in § 1981 differently.

3. *Legislative History on Intent.*

In determining whether the statute imposes liability without wilfulness or even fault, "our primary concern is with the intent of Congress." *Board of Educ.* v. *Harris*, 444 U.S. 130, 138 (1979). Section 1981 is § 1977 of the Revised Statutes of 1874, which in turn traces its origin to both Section 1 of the 1866 Civil Rights Act, 14 Stat. 27, and Section 16 of the Enforcement Act of

1870, 16 Stat. 144. *Runyon* v. *McCrary*, *supra*, 427 U.S. at 168-170 n.8; *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439 n.11 (1973).

Later [19] we review the broader legislative background of § 1981. Here, considering only the issue of required intent, it is clear that there was to be no violation of the 1866 Act by inadvertence. The Act contemplated both a criminal penalty and civil damages. In either case, the debates show, the elements of a violation were the same.

The 1866 Act in § 2 made it a federal misdemeanor to act under color of law to deny the equal rights guaranteed in § 1.[20] Opponents of the measure constantly raised the spectre of a state official being held to violate the law simply because he enforced a discriminatory state law in good faith. Each time the response came back,

> "Sir, the answer to the Senator from Pennsylvania is this: it requires a union of act and intention to commit a crime. A man must intend to commit it." CONG. GLOBE, 39th Cong., 1st Sess., 475 (1866) (Sen. Trumbull).[21]

When the opponents persisted that under the bill "a mistake is to be tortured into a crime," *id.* at 500 (Senator Cowan), the bill's author replied sarcastically that "that particular provision is in the imagination of the Senator from Pennsylvania." *Ibid.* (Sen. Trumbull).[22]

The discussion of elements of a violation of § 1 centered on the criminal provision, because the authors ex-

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[19] Pp. 36-41, *infra*.

[20] See Addenda, 8a. Section 2 was the basis for Rev. Stat. § 5510 and as amended and recodified is now 18 U.S.C. § 242.

[21] Hereinafter cited as "GLOBE." See also, *e.g.*, *id.* at 1758 ("there must be an act and vicious will in doing the act") (Sen. Trumbull); *cf. id.* at 502 (Sen. Howard).

[22] The bill was "for the purpose of punishing those who *deny* freedom." *Id.* at 605 (Sen. Trumbull) (emphasis supplied).

pected it to be the more effective sanction.[23] But the authors also clearly foresaw parallel civil remedies for violations of § 1. These would lie in actions in the state courts, or in some instances in the federal courts as provided for in § 3 of the bill.[24] And it is abundantly clear that they saw the elements of all violations, whether punished civilly or criminally, to be the same, and to require intent:

> "there are *two* legal modes of meeting any and every *willful* deprivation of these rights; one by action for damages at common law in the courts, which, however, will not lie against judicial officers; and the other by making it a penal offense, as the second section of this bill does . . . ." *Id.* at 1836 (Rep. Lawrence) (emphasis supplied).

When an amendment was proposed to strike the misdemeanor provision and provide only a civil remedy, Representative Wilson, manager in the House, argued for keeping the criminal penalty even though "There is no difference in the principle involved":

> "There is a difference in regard to the expense of protection. There is also a difference as to the effectiveness of the two modes. Beyond this, nothing." *Id.* at 1295.

The other statutory ancestor of § 1981 also calls for an intent standard. In part because of Congressional doubts concerning its constitutionality, § 1 of the 1866 Act was re-enacted as § 18 of the Enforcement Act of 1870. However, § 1981 (unlike 42 U.S.C. § 1982) also derives from a similar but independent provision, § 16 of

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[23] *Cf. id.* at 1758 (Sen. Trumbull); *id.* at 1295 (Rep. Wilson) (civil actions would yield only "a few dollars in the way of damages"); *cf. also* CONG. GLOBE, 41st Cong., 2d Sess. 3563 (1870) (juries would "give only one penny damages").

[24] See GLOBE at 1759 (Sen. Trumbull); see also note 86, *infra*.

the 1870 Act.[25] The 1870 provision was passed to implement the equal protection guarantee of the new Fourteenth Amendment, "and upon the first section of that amendment it rests." *Virginia* v. *Rives*, 100 U.S. 313, 333 (1880) (Field, J., concurring). And in guaranteeing all persons the "same right" to contract as white citizens, § 1981 parallels the Fourteenth Amendment in structure and purpose. *Tillman* v. *Wheaton-Haven Recreation Ass'n, supra*, 410 U.S. at 440 n.11.

Because § 1981 derives in part from a Fourteenth Amendment statute, it makes sense to construe § 1981 as embodying a standard of liability at least as demanding as the Amendment's. The latter standard is clear. This Court has held that "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977).

> "[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection clause of the Fourteenth Amendment."

City of Mobile v. *Bolden*, 446 U.S. 55, 66 (1980) (opinion announcing judgment); see also *id.* at 80 (Blackmun, J., concurring); *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 260, 272 (1979). A statute tied so closely to the Fourteenth Amendment certainly should not be assumed to impose a standard of liability vastly broader than the Amendment itself.

B. Section 1981 Did Not Create Liability Without Causation.

GBCA not only did not know of the Union's discrimination: GBCA in no way caused the wrong. GBCA merely signed a collective bargaining agreement that contained a nondiscriminatory hiring-hall provision. Discrimination later occurred—not from the hiring-

[25] Section 16, unlike the 1866 Act, extended to aliens and made no reference to equal rights respecting property.

hall provision, which is conceded by respondents to have been wholly lawful under § 1981—but rather from the Union's independent actions that were taken *separate from*, or *in violation of*, the collective bargaining agreement and its hiring-hall provision.

Section 1981 does not impose liability on a person who neither causes, authorizes, nor approves unlawful discrimination. Indeed, the present case is far less suitable for liability than was *Rizzo* v. *Goode*, 423 U.S. 362 (1976), an action under 42 U.S.C. § 1983 that involved "persistent deprival of federal constitutional rights . . . by . . . constituted authority" and "acts of subordinates for whom . . . [an official] is responsible." 423 U.S. at 382, 384 (Blackmun, J., dissenting). This Court nevertheless held in *Rizzo* that the supervisory officials could not be held liable even though the wrongdoers were their subordinates, because "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners . . . showing their authorization or approval of such misconduct." *Id.* at 371. This Court specifically rejected the theory that no "showing of direct responsibility for [the unlawful] actions" of the police force was necessary. *Id.* at 376. It further dismissed the contention that even officials had a "duty" under § 1983 to "eliminate future police misconduct and could be held liable if there was a "default of that affirmative duty." *Ibid.*

The same logic more than covers § 1981 in this case. Both § 1981 and § 1983 have an equal-protection objective. Indeed, because § 1981 applies to many situations also covered by § 1983, if as respondents urge a causation requirement were eliminated from § 1981, then § 1981 could be invoked to hold liable not just supervisory public officials, but supervisors or nonsupervisors in virtually any "contractual" or discrimination claim, even without any affirmative or causal link.[26]

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[26] Some lower courts have used § 1981 to circumvent *Rizzo*. *E.g.*, *Jones* v. *City of Philadelphia*, 491 F. Supp. 284 (E.D. Pa. 1980);

This is a far narrower case than *Rizzo* v. *Goode*. Here there simply was no meaningful causal connection between GBCA's consent to the hiring-hall provision in the collective bargaining agreement, and the Union's subsequent discriminatory acts. *Cf. Palsgraf* v. *Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928); RESTATEMENT (2D), TORTS §§ 440-453 (1965). GBCA had no right to control the Union, or even the employers. Under the collective bargaining agreement the Union, not GBCA, had the administrative responsibility for the operation of the hiring hall. GBCA was merely a collective bargaining agent for a few contractors. Once that nondiscriminatory agreement had been negotiated and signed, GBCA exited from the scene and had no further connection with the hiring hall.[27] Even had GBCA like the defendants in *Rizzo* possessed such a right of control, which it did not, a necessary corollary to *Rizzo* is that liability cannot be imposed simply on the ground that the defendant had a right to direct the actions of the wrongdoer:

> "By our decision in *Rizzo* v. *Goode*, 423 U.S. 362 (1976), we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability." *Monell* v. *Department of Social Services*, 436 U.S. 658, 694 n.58 (1978).

Here there was neither the right of control, nor controlling of the Union's conduct that caused discrimination.

Jones v. *Local 520*, S.D. Ill. (Civ. No. 76-3154, Oct. 5, 1981). Application of § 1981 to official discrimination of course is not involved here.

[27] There was no "affirmative link" between GBCA and the Union's discriminatory practices. *Rizzo* v. *Goode*, *supra*, 423 U.S. at 371. Nor does this case involve "the adoption of any plan or policy by . . . [GBCA]—express or otherwise—showing . . . [its] authorization or approval" of the discrimination. *Ibid.*

C. Section 1981 Did Not Create Vicarious Absolute Liability.

If § 1981 requires proof that a violator acted with discriminatory intent, and proof that the violator caused the wrongful act, is there yet some way that GBCA can be held legally responsible for the discrimination by the Union? The answer—from history, from logic, and from this Court's prior decisions—clearly is, no.

1. *Legislative History on Vicarious Liability.*

There is very little in the legislative history of the 1866 Act pertinent to the district court's novel theory that "vicarious liability," "per se liability," or "absolute liability" [28] was to be imposed on a private person. This is because such a notion would have been so preposterous, so fanciful to the Thirty-ninth Congress that none of the members had occasion to discuss it.

The debates confirm implicitly, however, that no one—neither supporters of the bill nor opponents (who complained of every aspect of the bill they could think of)—imagined that persons were being made liable for acts of racial discrimination committed by others. Senator Hendricks of Indiana, an opponent, understood

> "that if any man shall violate that principle by *his* conduct, *he* shall be responsible to the court; that *he* may be prosecuted criminally and punished for the crime, or *he* may be sued in a civil action and damages recovered by the party wronged. Is not that broad enough?" GLOBE 601 (emphasis supplied).

Nor would a concept of liability for the fault of others have been acceptable to supporters. Said the bill's author:

> "Who is to be punished? . . . *The person who*, under the color of the law, *does the act* . . . . Does this section propose to punish the community where the

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[28] A. 157. The individual and class respondents quite candidly and repeatedly stated that they rested their case against GBCA solely on a theory of "absolute liability." (J.A. 420, 423.)

> custom prevails? Or is it to punish the person who, under color of the custom, deprives the party of his right? It is a manifest perversion of the meaning of the section to assert anything else." *Id.* at 1758 (Sen. Trumbull) (emphasis supplied).[29]

Even more compelling are the debates on the 1871 Civil Rights Act, in which the Sherman amendment, a provision for limited vicarious liability—of municipalities for riots—*was* proposed and rejected. After reviewing that history in *Monell* v. *Department of Social Services*, *supra*, this Court recognized that "Congress refused to impose vicarious liability for the wrongs of a few private citizens." 436 U.S. at 692-93 n.57.

The outrage of Senators and Representatives—many of them the same ones who had approved the 1866 and 1870 Acts—at the thought of "vicarious liability" even confined to municipalities fairly shrieks from the pages of the *Congressional Globe*. It did no good for proponents of the measure to point out that it was to be part of a limited, careful, comprehensive legislative scheme in which the city would be liable only if a judgment was not paid by the rioters.[30] It did no good to argue that the localities had a duty to protect, or that damages should be spread on an insurance principle.[31] The oppo-

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[29] Elsewhere Senator Trumbull said:

> "A law may be iniquitous and unjust and wrong which undertakes to punish another for doing an innocent act, which would be righteous and just and proper to punish a man for doing a wicked act. . . . [W]ould it be just to apply the law which punishes a person for committing murder to an innocent person who had killed another accidentally, without malice? That is the difference. It is the difference between right and wrong, between good and evil." GLOBE 605.

[30] *E.g.*, CONG. GLOBE, 42d Cong., 1st Sess. (hereinafter cited as "42-1 GLOBE") at 751 (Rep. Shellabarger); *id.* at 756 (Sen. Edmunds) ("the tenderest and most convenient way" to hold a municipality liable).

[31] *E.g.*, *id.* at 751 (Rep. Shellabarger); *id.* at 756-757 (Sen. Edmunds).

nents of the provision, who prevailed, condemned it because

> "We are now, *for the first time*, presented with an enactment which undertakes to create a corporate liability for personal injury which *no prudence or foresight could have prevented*. . . .
>
> "I am sure that no authenticated case can be found in England or America where any municipal, statutory liability has ever been created for a private wrong or injury, unless upon the principle of malfeasance or neglect on the part of the municipality." 42-1 GLOBE at 762 (Sen. Stevenson) (emphasis supplied).

The proposal was denounced as totally unprecedented,[32] and because "it punishes the innocent and the guilty. . . . It violates all just principles of law." [33] It was excoriated for imposing liability without proof of knowledge or fault.[34]

Most interestingly, Senator Trumbull, the author of the 1866 Act, which by then was on the books, said that he would not support any imposition of civil liability which did not require proof of specific intent to deny equal rights: [35] "I do not know where the Government of the United States gets the constitutional authority to go into the States and establish police regulations." [36]

If the legislators of that era were so hostile to vicarious liability even of a governmental body,[37] can it seri-

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[32] *Id.* at 788 (Rep. Kerr); *id.* at 795 (Rep. Blair).

[33] *Ibid.*

[34] *Id.* at 791 (Rep. Willard); *id.* at 771 (Sen. Thurman: "What Justice is there in any such thing as that? Upon what principle can that be sustained for one moment?").

[35] *Id.* at 758-59.

[36] *Id.* at 759.

[37] The farthest they would go in relating liability to acts of others was in § 6 of the 1871 Act, which created limited civil liability with a one-year statute of limitations for those who "*having knowledge*"

ously be contended that they silently meant to impose it on non-acting, unknowing, private persons?

2. *Rules of Construction—Avoidance of Constitutional Difficulties.*

The Court recently cautioned against adding new remedies by judicial implication to statutes where Congress never contemplated them. *Northwest Airlines, Inc.* v. *Transport Workers' Union*, 451 U.S. 77, 97 (1981). Such expansion would certainly be required to give persons claiming racial discrimination under § 1981 a remedy, not based on fault or knowledge, against a non-participant in the acts complained of.

Beyond that, however such an extension of § 1981 would raise constitutional questions that adherence to the intent of the authors would avoid. *Cf. Ashwander* v. *TVA*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). For although this Court has tolerated against due process challenges a few impositions of liability for acts of others, these have been in the context of specific narrowly drawn statutes, traditional agency relationships, ownership, and most often dangerous objects.[38] The normal rule is that

> "In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the rela-

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of a conspiracy under 42 U.S.C. § 1985 *"and having power to prevent"* a wrong they "by reasonable diligence *could have prevented*" nevertheless refused or neglected to do so. 17 Stat. 15, codified, Rev. Stat. § 1981, 42 U.S.C. § 1986 (emphasis supplied).

[38] *Cf., e.g., Young* v. *Masci*, 289 U.S. 253, 260 (1933) (automobile) (referring to limits on liability even in such cases); *United States* v. *Park*, 421 U.S. 658 (1975) (statutory duty coupled with control). Although the Thirteenth Amendment postdated the Fifth Amendment's due process guarantee, there is absolutely no suggestion that the Thirteenth Amendment was intended to diminish due process constraints on legislation in any way. Indeed, due process limitations were reaffirmed and made applicable to the States in the nearly contemporaneous Fourteenth Amendment.

> tionship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment." *Scales* v. *United States*, 367 U.S. 203, 224-25 (1961).

Therefore in interpreting other federal statutes, both civil and criminal, this Court has not presumed that the Congress meant to impose liability for acts that a defendant did not authorize or control. Thus *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 212 (1979), refused to construe the Taft-Hartley Act, 61 Stat. 156, 29 U.S.C. § 185, to hold an international union liable for an illegal strike by a local which the international did not control. The same result had been reached under the Sherman Act.[39] Conversely, a local group cannot be charged with unlawful acts of its national affiliate for which it was not responsible. *Healy* v. *James*, 408 U.S. 169, 186-87 (1972).

In the present case, the district court made specific findings that GBCA not only did not know of the Union's discrimination, but that it had no duty to know, no reason to inquire. GBCA is not even in the construction business. This Court has made clear that there are due process limits on imposing liability on such entirely passive persons who never even had notice of any duty that could be violated. In *Lambert* v. *California*, 355 U.S. 225 (1957), the Court reversed a conviction under a statute punishing failure of an ex-convict to register:

> "But we deal here with conduct that is wholly passive—mere failure to register. It is unlike the commission of acts, or the failure to act under

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[39] *Coronado Coal Co.* v. *United Mine Workers*, 268 U.S. 295 (1925); *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 395 (1922) (even with knowledge, national body did not have duty to interfere with acts it did not authorize).

> circumstances that should alert the doer to the consequences of his deed." 355 U.S. at 228.[40]

In a sense, it is a matter of notice—a due process requirement that is not at all confined to criminal cases:

> "Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. . . . [Citing cases.] These cases involved only property interests in civil litigation." *Ibid.*

United States v. *United States Gypsum Co.*, 438 U.S. 422, 436 (1978), held that "we are unwilling to construe the Sherman Act as mandating a regime of strict-liability criminal offenses." See also *United States* v. *Bishop*, 412 U.S. 346, 361 (1973) (tax offense). The intent element is to be construed in light of constitutional constraints. *United States* v. *Freed*, 401 U.S. 601, 613-14 (1971) (Brennan, J., concurring). Normally punishment without proof of intent presupposes knowledge, or at least violation of a duty to know. Neither was present here. Cf. *Felton* v. *United States*, 96 U.S. 699, 703 (1878). And in civil contexts as well as criminal, federal statutes have been construed not to impose sanctions on an unsuspecting defendant. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976).[41]

3. *Problems with the District Court's Reasoning.*

None of the cases the district court relied on as "analogous" even remotely supports the admittedly unprecedented, A. 142, holding below.

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[40] *Compare Powell* v. *Texas*, 392 U.S. 514 (1968), *with Robinson* v. *California*, 370 U.S. 660 (1962) (under Eighth and Fourteenth Amendments, punishment for conduct, as opposed to passive status, permissible); *cf. United States* v. *Keuylian*, 602 F.2d 1033, 1043 (2d Cir. 1979).

[41] The criminal provision, of the 1866 Act, now 18 U.S.C. § 242, of course requires proof of specific intent. *Screws* v. *United States*, 325 U.S. 91 (1945). The authors said the civil remedy was no different. See p. 17, *supra*.

(a) *Respondeat Superior.*

The district court compared its ruling to the doctrine of *respondeat superior*. This Court, however, never has held that that doctrine applies to § 1981, and has rejected its application under the only Reconstruction Era statute where the issue was presented. *Monell* v. *Department of Social Services, supra*, decided that "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory" and that it was necessary to prove that an "official municipal policy of some nature caused [the] constitutional tort." 436 U.S. at 691. The Court referred to the rejection of the Sherman Amendment, discussed pp. 22-23, *supra*, and further noted "the absence of any language in § 1983 which can easily be construed to create *respondeat superior* liability." Id. at 693 n.57.[42]

In any event, *respondeat superior* is inapplicable on its own terms. First, the doctrine traditionally applies to the master-servant or employer-employee relationship, which is not involved here. "A servant is a person employed by his master to perform service for him in his affairs with the retention by the master of control, or the right of control, over the physical details of his service." 2 F. HARPER & F. JAMES, TORTS § 26.6 (1956). GBCA was not the "master" or "employer" of the Union, nor was the Union a "servant" or "employee" of GBCA. Moreover, "control over the servant's conduct or the right to control his conduct is crucial to the imposition of vicarious liability." *De Tore* v. *Local 245*, 615 F.2d 980, 984 (3d Cir. 1980). Yet GBCA is merely a trade association and possessed no right to control the conduct of the Union. Finally, *respondeat superior* is limited to acts within the scope of employment. 2 HARPER & JAMES *supra;* RESTATEMENT (2D), AGENCY §§ 212-218 (1958).

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[42] Other district courts have observed that "the doctrine of *respondeat superior* is not applicable under §§ 1981 and 1983." *Raffety* v. *Prince George's County*, 423 F. Supp. 1045, 1052 (D. Md. 1976). See also *Bennett* v. *Gravelle*, 323 F. Supp. 203 (D. Md. 1971), *aff'd*, 451 F.2d 1011 (4th Cir. 1971), *petition for cert. dismissed*, 407 U.S. 917 (1972); *Barrow* v. *Bounds*, 498 F.2d 1397 (4th Cir. 1974).

Even if the Union could be mischaracterized as a non-servant agent of GBCA (which it was not):

> "Since an agent who is not a servant is not subject to any right of control by his employer over the details of his physical conduct, the responsibility ordinarily rests on the agent alone, and the principal is not liable for the torts he may commit." W. PROSSER, TORTS § 70 (4th ed. 1971).

So an agency relationship alone could not support vicarious liability against GBCA. Even that minimal connection, however, does not exist, as "agency is the *fiduciary relation* which results from the manifestation of *consent* by one person to another that the other shall *act on his behalf and subject to his control*, and consent by the other so to act." RESTATEMENT (2D), AGENCY § 1 (emphasis supplied). To assert that the Union was the "agent" of GBCA would doubtless come as a bewildering surprise to the employees represented by the Union in the negotiations with the trade associations. Nor has there been "consent" by GBCA for the Union to be its "agent," and certainly no consent by the Union to be subject to GBCA's control. Furthermore, it is absurd to suggest that the Union that sat across the bargaining table was a "fiduciary" acting on GBCA's behalf. And since GBCA is simply a non-employing trade association, it is difficult to fathom what possible function the Union ever could perform for GBCA. On analysis, the court's effort to fit agency terminology to the facts of this case crumbles.[43]

(b) *Title VII Cases.*

The next "analogy" invoked by the district court was cases under Title VII of the 1964 Civil Rights Act holding liable parties to collective bargaining agreements that

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[43] GBCA did have one agency role—but as an *agent*, to bargain for its principals, a group of employers. Even if the employers had discriminated—which the district court found they had not—to hold an agent liable for the torts of his principal would be to stand agency law on its head.

were *themselves* discriminatory. Apart from the fact that in Title VII, unlike § 1981, Congress unmistakably imposed liability in some situations for mere disparate racial impact, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), these Title VII cases have absolutely no relevance because the collective bargaining agreement signed by GBCA was neutral and nondiscriminatory in intent *and impact*. The district court specifically noted that the plaintiffs' allegations were "not directed against the hiring hall system per se" and were "not attacking the hiring hall procedures set forth in the contract." (A. 19.) So even under the broad standards of Title VII, GBCA would not have been liable. And Title VII is, moreover, a very different statute from § 1981. Title VII's "disparate impact" standard is based not on judicial expansion of a general declaration like § 1981, such as respondents seek here, but rather on Title VII's precise language and purpose. *Griggs*, *supra*, 401 U.S. at 429-31; *cf. TVA* v. *Hill*, 437 U.S. 153, 194-95 (1978).

(c) *NLRB Cases.*

The district court cited NLRB cases holding employers (not associations) liable for hiring-hall conduct that violated the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.* In each, however, the employer knew or should have known of the discrimination.[44]

(d) *§ 1981 Hiring-Hall Cases.*

The district court conceded that hiring-hall cases under § 1981 established that "there can be no automatic employer liability upon proof of a union's discriminatory operation of a hiring hall." (A. 146-47.) This line of authority indeed confirmed GBCA's position that liability

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[44] *E.g.*, *NLRB* v. *United States Steel Corp.*, 278 F.2d 896 (3d Cir. 1961), *cert. denied*, 366 U.S. 908 (1961); *NLRB* v. *Local 269, IBEW*, 357 F.2d 51 (3d Cir. 1966). In *Morrison-Knudsen Co.* v. *NLRB*, 275 F.2d 914 (2d Cir. 1960), *cert. denied*, 366 U.S. 909 (1961), the employers' knowledge of the illegal conduct is readily apparent from the court's opinion, which merely declined to quibble over "the extent of their knowledge." 275 F.2d at 917.

is "not [to be] based solely upon the fact that racial discrimination has resulted by the actions of the unions under their lawful collective bargaining agreements to which respective contractor associations are parties." *Byrd* v. *Local Union No. 24*, 375 F. Supp. 545, 562 (D.Md. 1974).[45]

D. Practical Considerations.

Because § 1981 can be invoked in many of the same cases of official action that otherwise would be brought directly under the Fourteenth Amendment, the failure to recognize a discriminatory-intent and causation standard would render meaningless this Court's decision in *Washington* v. *Davis*, *supra*. Litigants would avoid the intent requirement of the Amendment by the simple expedient of pleading § 1981. Then, as this Court apprehended, "a whole range of tax, welfare, public service, regulatory, and licensing statutes" and other measures could be invalidated simply because they were alleged "more burdensome to the poor and to the average black than to the more affluent white." *Washington* v. *Davis*, *supra*, 426 U.S. at 248.

In addition, the district court equated the ancient words of § 1981 with Title VII of the 1964 Civil Rights Act, and thought that the same liability standard should be applied to both. (A. 140, 157.) But the two statutes are

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[45] The district court "inferred" that possibly *EEOC* v. *Enterprise Ass'n Steamfitters*, 542 F.2d 579 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977), suggested otherwise in a "dictum." (A. 151.) There the Second Circuit affirmed a district court's refusal to award back pay under Title VII against a trade association that had previously been held injunctively liable. No appeal was taken from the district court's award of injunctive relief. Plaintiffs argued that back pay should have been awarded because the injunctive relief "could not have been ordered absent a finding of discrimination" by the association. 542 F.2d at 589. The court of appeals found the plaintiffs' argument to be "not without reason" because the entry of injunctive relief against the association would not have been proper absent such a finding of discrimination on its part. *Ibid.* It is totally puzzling why the district court in the present case thought that the *Enterprise Ass'n* decision supported its position.

worlds apart. Title VII is the product of modern Congressional care, attention and compromise. Unlike § 1981, it is "a statute of extraordinary clarity." *United Steelworkers* v. *Weber*, 443 U.S. 193, 216 (1979) (Burger, C.J., dissenting). Unlike § 1981, it was debated in the Congress as an employment-discrimination statute. It is comprehensive and contains administrative procedures and remedies that must be exhausted before calling upon the courts. It contains a clear and uniform statute of limitations. It strictly limits damages to two years' back pay. It exempts many kinds of employers, including those with fewer than fifteen employees. 42 U.S.C. §§ 2000e(b), 2000e-1, 2000e-5. It also provides for administrative investigations and for administrative regulations that identify with particularity the employment practices that are proscribed. 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-8; 29 C.F.R. §§ 1601.1, *et seq.* These provisions serve to eliminate frivolous or defective claims, and they notify employers of expected conduct. In this fashion Title VII makes somewhat more reasonable the rule in § 703(a)(2)[46] that a *prima facie* case can be established without a showing of discriminatory intent.

Section 1981, which is "separate, distinct, and independent" of Title VII, *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975), is a far different statute. Unlike Title VII, § 1981 has no screening procedures or requirement for exhaustion of administrative remedies. It has no administrative remedies. It is unaccompanied by regulations defining proscribed conduct or the scope of lawful action under § 1981. It is, moreover, far broader in its reach than Title VII, and is not limited to employment discrimination.

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[46] For § 703(a)(1) of Title VII, however, "proof of discriminatory motive is critical." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977); see also *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 579-80 (1978); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 805 (1973). See also *Great American Fed. Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979) (rejecting attempt to use a Title VII analogy for 42 U.S.C. § 1985(3)).

Indeed, § 1981 is not even limited just to contractual relationships, but broadly ensures the "same right . . . to sue, be parties, give evidence, and *to the full and equal benefit of all laws and proceedings for the security of persons and property* as is enjoyed by white citizens . . . [and to] *be subject to like punishment, pains, penalties taxes, licenses, and exactions of every kind, and to no other.*" (Emphasis supplied.) The potential scope of § 1981's application is truly great, and so, too, would be the resulting mischief if the district court's application of it to unknowing nondiscrimination by private parties were upheld.

II. THE DOCTRINE OF *JONES* v. *MAYER CO.* SHOULD NOT BE EXTENDED TO PRIVATE INACTION.

Thirteen years ago *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), overruled prior decisions[47] and held that the property provision of the 1866 Act, Rev. Stat. § 1978, now 42 U.S.C. § 1982,[48] could reach certain kinds of racial discrimination by certain private persons. It was not a § 1981 case. And even as to the statute it did construe, § 1982, *Jones* v. *Mayer Co.*'s novel historical interpretation, which it called "without established precedent," 392 U.S. at 437, if read too broadly has not well stood the test of time.[49] Four Justices of this Court have expressed the view, or come close to doing so, that even in reaching the kinds of private actions it did, *Jones* was

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[47] See *Corrigan* v. *Buckley*, 271 U.S. 323, 330-331 (1926); *Hodges* v. *United States*, 203 U.S. 1 (1906); *cf. Hurd* v. *Hodge*, 334 U.S. 24, 31 (1948); *Virginia* v. *Rives*, 100 U.S. 313, 318 (1880).

[48] Rev. Stat. § 1978, 42 U.S.C. § 1982, provides in relevant part that all citizens "shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property."

[49] See, *e.g.*, C. FAIRMAN, 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1218-1259 (1971); Casper, *Jones* v. *Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89; Henkin, *The Supreme Court, 1967 Term, Foreword: On Drawing Lines*, 82 HARV. L. REV. 1 (1968). The question here, however, is not whether *Jones* was supportable on its facts, but rather whether *Jones* should be greatly extended.

A. Section 1981 Does Not Reach All Types of Private Defendants.

Just as clearly as *Jones* held that § 1982 reaches *some* kinds of "racially motivated," 392 U.S. at 421, 426, refusals by a private corporation to sell or rent property, there are many kinds of private discriminations that that case never addressed. The Court was careful to point out that even § 1982 did not concern discrimination in advertising, nor perhaps deal with financing or several other avenues of housing discrimination. 392 U.S. at 413. This Court also recognized possible limits on the reach of § 1982, and of § 1981 as well, in *Tillman* v. *Wheaton-Haven Recreation Ass'n*, *supra*, 410 U.S. at 438. Just last Term, in *City of Memphis* v. *Greene*, *supra*, this Court noted that § 1982 bars property discrimination by officials and "*certain* private actions as well;" and it held that the discrimination there did not involve "*the kind of* property interests that we have identified as being within the reach of § 1982." 451 U.S. at 120, 124 (emphasis supplied).

Nor is § 1981's equal-right-to-contract clause a monolithic and all-encompassing piece of legislation. *Runyon* v. *McCrary*, *supra*, held it applicable to a flat policy of racially-motivated discrimination by a nonsectarian private school, but again carefully pointed out that the Court was not deciding whether § 1981 addressed many kinds of private discrimination not before it. 427 U.S. at 160; see also *id.* at 187-189 (Powell, J., concurring). *Johnson* v. *Railway Express Agency, Inc.*, *supra*, had earlier assumed, understandably,[51] without undertaking to examine the statute's history, that § 1981 reached some racial discrimination in private employment. But certainly no one until now has suggested that § 1981 was intended to impose liability for hiring discrimination on a private person that was a

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[51] 421 U.S. at 459-60. Government counsel had noted that "the question of the scope of section 1981 is not before the Court." Brief for the United States as Amicus Curiae, No. 73-1543, O.T. 1974, at 12 n.6.

non-participating, non-knowing, non-employer. The fact that a federal statute may be read to imply a private cause of action against knowing violators does not mean that an action exists against a person who had no wrongful intent. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976).

Statutes "must . . . be read against the background of the legislative history . . . and the historical context from which the Act arose." *United Steelworkers* v. *Weber*, 443 U.S. 193, 201 (1979). Surprisingly, although the wave of § 1981 suits of all sorts has continued to grow,[52] this Court never has reviewed that statute's legislative history to consider which kinds of private defendants the equal-right-to-contract provision reaches.[53] Even if it be assumed that § 1981 imposes liability on private actions other than those denying equal legal capacity, it is worth considering the legislative history for a sense of how widely the 1866 Congress[54] might have intended to sweep its net—what sorts of private activities—or inactivities—and what kinds of private defendants, with what states

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[52] See Heiser, *Intent v. Impact: The Standard of Proof Necessary To Establish a Prima Facie Case of Race Discrimination Under 42 U.S.C. § 1981*, 16 SAN DIEGO L. REV. 207, 208, 217 (1979) ("explosion" of "thousands" of § 1981 and § 1982 cases).

[53] *Runyon*, not an employment-discrimination case, treated the matter as essentially settled by *Jones*. *Johnson* v. *Railway Express Agency Inc.*, relying on lower-court opinions, merely acknowledged that § 1981 would provide a remedy in some instances of employment discrimination. *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), looked at the legislative history, but simply to determine whether a white plaintiff might sue. *Johnson*, moreover, dealt with firing—*i.e.*, interruption of an *existing* contractual relationship—rather than with refusals to hire. *Cf. Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 644-45 (1979) (Powell, J., concurring).

[54] Of course, § 1981 derives from the Fourteenth-Amendment 1870 Act as well, which was limited to official denials of rights. See, *e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 359 (1886); *Ho Ah Kow* v. *Nunan*, 12 Fed. Cas. 252, 256 (No. 6,546) (C.C.D. Cal. 1879) (Field, J., on circuit); pp. 17-18, *supra*.

of mind, did the 1866 Congress think it was addressing in the ancestor of § 1981?

Several aspects of the debates on the contract provision are striking:

1. Slaves, unlike citizens, had no right to contract. The focus of the 1866 bill was to assure that black people had the rights of citizens—to overrule legislatively the infamous decision in *Dred Scott* v. *Sandford*, 19 How. 393 (1857), and to invalidate state laws that were premised on the supposition that blacks were less than citizens. Hence, "civil" rights.[55]

Because of doubts about the power to overrule *Dred Scott* legislatively, the same Congress proposed the Fourteenth Amendment, which took the 1866 legislation as its model.[56] Senator Trumbull of Illinois, author and manager of the bill,[57] Chairman of the Judiciary Committee, and a moderate in a Congress not yet dominated by radical reconstructionists,[58] repeatedly compared his objective to the protection enjoyed by citizens of other states under the Privileges and Immunities clause of Article IV, which was contemporaneously seen as essentially an equal-pro-

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[55] *Webster's* defines "civil" as "Relating, pertaining, or appropriate to a citizen . . . Relating to citizenship." WEBSTER'S NEW INTERNATIONAL DICTIONARY 492 (2d ed. 1961).

[56] See generally *Hurd* v. *Hodge*, 334 U.S. 24, 32-33 (1948); *Virginia* v. *Rives*, *supra*, 100 U.S. at 333 (Field, J., concurring).

[57] Senator Wilson had proposed a bill to expand the powers of the Freedmen's Bureau. GLOBE at 39. Senator Trumbull asked him to wait until the Thirteenth Amendment had been adopted, *id.* at 43, and then himself introduced two bills: one to enlarge the powers of the Freedmen's Bureau in the Southern states (S. 60) (with § 7 somewhat broader than § 1 of the 1866 Act); and the other (S. 61) that became the 1866 Act. *Id.* at 129. Debate on both proceeded through the winter of 1866, and both passed. Both were vetoed by President Johnson; the latter was passed over his veto, and later served as a model for the Fourteenth Amendment, after passage of which it was reenacted as § 18 of the 1870 Enforcement Act.

[58] *See* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 16 (1955); see generally *id.* at 11-29.

tection-of-the-laws guarantee;[59] the bill would not permit "any statute which is not equal to all." GLOBE at 474. The object of the bill, simply put, was to declare that black people were citizens, with all "the rights of citizens," including "the right to enforce rights in the courts, to make contracts." *Id.* at 475; see also *id.* at 476 (Senator Trumbull), 1262 (Rep. Broomall), 1266 (Rep. Raymond), 1294 (Rep. Wilson).[60]

> "[I]t simply gives the persons who are of different races or colors the same civil rights. That is its full extent; it goes no further." *Id.* at 504 (Sen. Howard).
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> "[I]t is simply intended to carry out a constitutional provision, and guaranty to every person of every color the same civil rights. That is all there is to it." *Id.* at 599 (Sen. Trumbull); see also *id.* at 606 (Sen. Trumbull.)

Similarly, Representative Wilson of Iowa, floor manager in the House: "We are establishing no new right, declaring no new principle." *Id.* at 1117; see also *id.* at 1123 (Rep. Wilson). "It is, in my judgment, but declaratory of the existing law," guaranteeing "fundamental rights of citizenship and nothing else," "fundamental rights and immunities which are common to the humblest citizen of every free State," such as "the right to make and enforce contracts." *Id.* at 1151-52 (Rep. Thayer), 1836 (Rep. Lawrence).

2. Therefore the discussion of the equal-right-to-contract provision emphasized removing state-created legal incapacities of blacks to contract and sue. This was no small thing. In 1866 black people in many states had no legal capacity to make a contract, and no legal capacity to sue in court to enforce one. Senator Hendricks was

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[59] *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869); see also *Baldwin* v. *Montana Fish & Game Comm'n*, 436 U.S. 371, 378-87 (1978); *Hicklin* v. *Orbeck*, 437 U.S. 518, 524 (1978).

[60] The act was so interpreted by contemporary courts. See, *e.g.*, *Smith* v. *Moody*, 26 Ind. 299, 307 (1866).

not ashamed to say that "In the State of Indiana we do not recognize the civil equality of the races." *Id.* at 602. Representative Marshall referred to racially discriminatory laws in California and Illinois. *Id.* at 628-29. A Mississippi law forbade freedmen to be independent businessmen. *Id.* at 1160. Representative Moulton of Illinois mentioned instances "where a State says, as many do, in the South, that the black man shall not make contracts," *id.* at 632; he added that in the previous session the Illinois legislature had repealed discriminatory laws, "so that to-day in the State of Illinois . . . a black man can make contracts." *Id.* at 633. Senator Trumbull emphasized that his bill aimed simply at ending such legally-imposed disabilities:

> "It will have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race. It will have no operation in the State of Kentucky when her slave code and all her laws discriminating between persons on account of race or color shall be abolished." Id. at 476.[61]

3. The primary focus of the legislators was on ending state *laws* that discriminated against blacks, especially the "black codes" being enacted by the readmitted Southern States. See, *e.g.*, *id.* at 1123-24 (Rep. Cook); *id.* at 1153 (Rep. Thayer); *id.* at 39 (Sen. Wilson); *cf. Slaughter-House Cases*, 16 Wall. 36 (1873). Senator Trumbull promised that his bill would end "laws that prevented the colored man going from home, that did not allow him to buy or to sell, or to make contracts," *id.* at 322; see also *id.* at 43 (Sen. Trumbull), passed by "Legislatures which have assembled in the insurrectionary States," *id.* at 474 (Sen. Trumbull). There are incessant references to state "laws" and "legislatures." See, *e.g.*, *id.* at 340 (Sen.

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[61] See also GLOBE at 505, 605, 1761 (Sen. Trumbull). "[I]f the State of Kentucky makes no discrimination in civil rights between its citizens, this bill has no operation whatever in the State of Kentucky." *Id.* at 600 (Sen. Trumbull). See also Casper, *supra*, at 121.

Wilson), 475, 600 (Sen. Trumbull), 603 (Sen. Wilson), 1117-18, 1151 (Rep. Thayer), 1758 (Sen. Trumbull). Opponents of the bill, too, constantly bemoaned its effect on state "laws." *See, e.g., id.* at 598, 1415 (Sen. Davis), 601 (Sen. Guthrie), 603 (Sen. Cowan). The constant reference to "laws" has been noted by scholars of the period. See, *e.g.*, C. FAIRMAN, 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1232 (1971) (hereinafter cited as "FAIRMAN.")[62]

4. Of immense importance to construing § 1981, but apparently eluding the Court's notice in *Jones*,[63] is the fact that most of the debate on § 1 of the 1866 Act was about a bill that contained explicit antidiscrimination language—a bill that might have been construed more broadly than the one finally enacted. Senate Bill 61, which became the 1866 Act, contained throughout all the debates preceding passage in the Senate and House this clause, which is not in the bill as enacted:

> "That there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; . . . ." (Addenda 4a.)

The debates about § 1 concerned the bill with this provision in it. Then, after the Senate had passed the bill (Addenda 6a) and when the House was almost ready to vote, an amendment was proposed to strike this antidiscrimination clause. Representative Wilson, the bill's manager, explained that

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[62] There were occasional references in the debates, and in the statute itself, to "custom;" but that word as used in legal terminology in the mid-Nineteenth Century generally referred to "official custom or usage," not to unofficial community activity. *See* FAIRMAN, 1238-44; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 162-69 (1970); *Civil Rights Cases*, 109 U.S. 3, 16 (1883) ("customs having the force of law"); *but cf.* Casper, *supra*, at 106-07, 117.

[63] This history is, however, mentioned in *Georgia* v. *Rachel*, 384 U.S. 780, 791-792 (1966), and was noted by Mr. Justice Stevens concurring in *Runyon* v. *McCrary*, *supra*, 427 U.S. at 189 n.1.

> "some gentlemen were apprehensive that the words we propose to strike out might give warrant for a latitudinarian construction not intended." *Id.* at 1366.

On that basis, the antidiscrimination clause of the 1866 bill was stricken. *Ibid.* The significance of this action in interpreting the reach of § 1981 to new areas should not be ignored. *See* FAIRMAN 1219-22, 1233; Bickel, *supra*, at 11-29; *cf. Georgia* v. *Rachel*, 384 U.S. 780, 791-92 (1966).

5. It was often reiterated that the bill's purpose was to ensure to Negroes "civil" rights—not "political" ones, such as an equal right to vote,[64] or "social privileges" [65]—and certainly not economic claims on private individuals who did not discriminate.[66] It was emphasized that the legislation would in no way diminish the rights of white people or create any liability for them [67] except for those white people—most likely state officials enforcing dis-

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[64] See, *e.g.*, GLOBE at 1151 (Rep. Thayer), 1159 (Rep. Windom), 1367 (Rep. Wilson).

[65] *Ibid.* Indeed, the very Congress that passed the 1866 Act was enacting legislation concerning racially segregated schools in the District of Columbia. See Act of July 23, 1866, c. 217, 14 Stat. 216; Act of July 28, 1866, c. 308, 14 Stat. 343. So was the Congress that enacted the 1871 Civil Rights Act. See Act of March 3, 1873, c. 308, 17 Stat. 619.

[66] The Act, its contemporaries said, "was only intended to secure to the colored race the same rights and privileges as are enjoyed by white persons: it was not designed to relieve them from those obstacles in the enjoyment of their rights to which all other persons are subject, and which grow out of popular prejudices and passions." *Virginia* v. *Rives*, *supra*, 100 U.S. at 333 (Field, J., concurring). In it Congress "did not assume . . . to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery." *Civil Rights Cases*, 109 U.S. 3, 22 (1883).

[67] See, *e.g.*, GLOBE at 606 (Sen. Trumbull), 1151 (Rep. Thayer), 1159 (Rep. Windom), 1760 (Sen. Trumbull).

criminatory laws, or conceivably conspirators[68]—who might actively interfere with the *civil* rights of blacks. See, *e.g.*, *id.* at 475, 500 (Sen. Trumbull), 1120 (Rep. Wilson).

6. It is difficult to prove a negative. Yet it is striking that there is no hint in the hundreds of pages of debate that the members of the Thirty-ninth Congress thought they were enacting a law forbidding all discrimination by private employers (save perhaps some concerted action) —much less a law imposing liability on a private *non*-employer (GBCA) found to be *unaware* that discrimination *by others* was going on. The legislators' aim was to end legal restrictions on contractual employment of blacks. Indeed, the former idea was so far from their minds that it was not debated. *Cf. id.* at 523 (Sen. Davis; opponent); *id.* at 1680 (veto message). It is certain that the opponents would have howled in outrage had anyone thought the bill could eliminate all private discrimination generally, much less punish private inaction. Such reflects the conclusion of scholars. See FAIRMAN 1219, 1235; Casper, *supra*, at 112.

With the scope of the 1866 Act so clearly limited in the minds of its enactors, no basis exists to extend it to private relationships involving neither action, nor wrongdoing, nor privity with the plaintiff, and heretofore never thought within the Act's ambit.

B. Section 1981 Is Not Identical to Section 1982 in Its Reach.

There are differences between the equal right to hold property protected by § 1982 and the equal capacity to contract and sue guaranteed by § 1981. There are some indications, though not unambiguous, that the Congress saw the two somewhat differently, and grouped property on one side, putting the ending of judicial and contractual disabilities on the other. *Cf.* GLOBE at 1781 (Sen. Cowan). The Congress in 1870 treated the property and capacity provisions differently when it enacted § 16 of

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[68] *Cf. id.* at 1160 (Rep. Windom); *but cf.* FAIRMAN 1232-33.

the 1870 Act without a property provision. It did so specifically to reserve the property protection for citizens, while in § 16 extending to aliens (then coming to California) the clearly more limited right to contract and sue in the courts. CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870) (Sen. Stewart). "The rights protected by [§ 16 of] the [1870] Act were narrow and specific." *United States* v. *Price*, 383 U.S. 787, 802 (1966).

The revisers and Congress of 1874 carried forward the distinction, with "separation of the property right guaranties . . . from the more generally stated equality provisions," *Jones* v. *Alfred H. Mayer Co.*, 379 F.2d 33, 38 (8th Cir. 1967), *rev'd* 392 U.S. 409 (1968), which is why § 1981 and § 1982 are two separate statutes today. The right to contract was grouped with abolition of other legal incapacities; the right to own property was more likely viewed as an affirmative right. *Cf. Runyon* v. *McCrary*, *supra*, 427 U.S. at 195 (White, J., dissenting). Moreover, it has been recognized that the words of § 1982, because it (unlike § 1981) rests more on the Thirteenth Amendment,[69] can mean something different from the same words in other contemporaneous enactments. *District of Columbia* v. *Carter*, 409 U.S. 418 (1973).

Similarly, this Court's decisions have scrutinized property control especially carefully in invalidating intentional discrimination involving, for example, quasi-official real-estate zoning. *Cf. Hurd* v. *Hodge*, 334 U.S. 24 (1948). Thus in *Jones* the petitioners argued that their case against the discriminator was narrowly "about a community, a town," in which the developer even had power to "tax" through assessments.[70] *Cf. Evans* v. *New-*

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[69] Section 1982, Rev. Stat. § 1978, derived from part of § 1 of the 1866 Act; § 1981, Rev. Stat. § 1977, did also, but had a totally separate predecessor in § 16 of the 1870 Act, a Fourteenth Amendment enactment. See pp. 17-18, *supra*; Addenda 15a.

[70] Brief for the Petitioners, No. 645, O.T. 1967, at 51. Similarly, the Government in that case told this Court that "we invoke the provision [§ 1982] here only against a massive effort to exclude an entire ethnic group from a community," and assured the Court

ton, 382 U.S. 296 (1966); *Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Bell* v. *Maryland*, 278 U.S. 226, 329-331 (1964) (Black, J., joined by Harlan and White, JJ., dissenting); *Jones* v. *Alfred H. Mayer Co.*, *supra*, 379 F.2d at 44 (Blackmun, J.). This Court's cases on private discrimination under Nineteenth-Century enactments have predominantly been in such contexts and have concerned wilful acts.[71]

We do not argue, as Mr. Justice Harlan persuasively did dissenting from *Jones*' departure from precedent on § 1982, that § 1981 was strictly confined to state action. That certainly is one reasonable reading of the legislative history. But we recognize that the statute has some Thirteenth Amendment roots, and that rigid attempts to draw lines between state and private intentional discrimination might not always work today. Though official acts clearly were the Congressional focus, it might possibly be that a few wilful private combinations, or a discriminatory policy like that in *Jones*, could be so threatening as to spill into the statute's coverage.[72] But certainly § 1981 was not seen as creating a *duty to act* to rectify discrimination by others that one was *not aware of*, and had no power to control anyway. The question

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that its theory would reach "only those relatively rare instances." Brief for the United States as Amicus Curiae, No. 645, O.T. 1967, at 25-26.

[71] Even the first Mr. Justice Harlan, dissenting in the *Civil Rights Cases*, 109 U.S. 3 (1883), saw the Congressional power under the Thirteenth Amendment as limited to "discrimination practised by corporations and individuals in the exercise of their public or quasi-public functions." 109 U.S. at 43. *Cf. Runyon* v. *McCrary*, *supra* (education). *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969), and *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973), dealt with devices restricting access to recreation that were "functionally comparable to a racially restrictive covenant," whose enforcement, under *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), would violate the Fourteenth Amendment. *Sullivan*, *supra*, 396 U.S. at 236.

[72] *Cf.*, *e.g.*, GLOBE at 1160 (Rep. Windom). *Contra*, *Hodges* v. *United States*, 203 U.S. 1 (1906), overruled in *Jones*, 392 U.S. at 443 n.78. The question today is not one of constitutional power to reach beyond state action, but rather, what was the Congress' intent?

is as to the extent of the *duty*, if any, of private persons that flows from the *rights* acknowledged in § 1981. Nothing in the history remotely hints that such a duty could extend as far as an unknowing party like GBCA.

If § 1981—the earliest and most basic and primitive of the post-Civil-War enactments—is to be applied in the context of private employment, it should be done in a way that respects the nature of the statute itself. This Court never has held that § 1981 reaches *all* contractual *relationships* or *all persons* however tenuous their relation to another's discriminatory acts. *Cf., e.g., Runyon* v. *McCrary*, *supra*, 427 U.S. at 187-189 (Powell, J., concurring).[73] The Nineteenth-Century statute is a crude, albeit noble and important, tool for assuring that the courts are open to all and guaranteeing equal civil rights connected with certain basic activities. It is a sort of blunt instrument for hammering away at grossly discriminatory behavior. It is not carefully honed.[74] It cannot legitimately be converted and extended into a vehicle for sophisticated social and economic restructuring, by reaching out to impose liability on private persons who have not discriminated, but who might appear to be convenient sources of funds. The Congress of the last century did not go so far, and this Court never has, either. If § 1981 reaches *some* private *activity*, it surely should not be extended to reach unknowing private *inactivity*, nor be held a Congressional device to visit retribution for the sins of the guilty on the unaware and the innocent.

III. THE COURT HAD NO POWER TO ASSESS REMEDIAL PAYMENTS AGAINST A NON-WRONGDOER.

The relief ordered by the district court was extraordinary by any measure and, as to GBCA, totally inexplicable, unless by the court's remark that GBCA and the

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[73] *Cf. Civil Rights Cases*, 109 U.S. 3, 24 (1883): "It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make . . . ."

[74] See pp. 30-32, *supra*.

other named defendants "were both readily and easily determinable and accessible to the Court." (A. 212.) The decree set up an elaborate five-year job training and referral program to be conducted by a master and staff.[75] (A. 229-42.) GBCA, in spite of its lack of culpability, was ordered to pay 10% of the expenses (in addition to the astronomical attorneys'-fees liability it faces simply for having been enjoined).[76] (A. 252, 254.) With inflation and perhaps further augmentation of the court-hired staff,[77] the total remedial payments will conservatively exceed $1,000,000—all to remedy the Union's wrong. Yet, the Union was ordered to pay only 40% of the amount; GBCA, a full 10%.[78]

The mandatory programs of the decree were to remedy discrimination. The money expenses of them are likewise remedial, and for all practical purposes are damages for the plaintiff class. They cannot be sustained against GBCA as a matter of due process, nor under this Court's supervisory power[79] should they be sus-

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[75] The original decree called for administration by a U.S. magistrate. (A. 229-30.) The court later substituted a master in order to impose the expense of administration on all the defendants. (A. 199 n.6, 246.)

[76] See A. 244. The individual and class plaintiffs now are seeking attorneys' fees under 42 U.S.C. § 1988 of $864,263.75 multiplied by perhaps three or four (covering only services through early 1980). Pennsylvania is asking for $93,125.31. *See* J.A. 42, 412.

[77] The district court in an order of August 21, 1981, directed that the paid staff of the program be increased. Post Decree Order No. 44. The first year's expense of the remedial program exceeded $200,000, with four years to go.

[78] The court originally had said it would assess payments only against the Union and JATC. *Compare* J.A. 416-17 *with* A. 254.

[79] *Cf. Wayman* v. *Southard*, 10 Wheat. 1 (1825); Note, 76 HARV. L. REV. 1656 (1963). Such a novel duty to make restitution for the wrongs of others is to be contrasted with Title VII, which even as to employers (which GBCA is not) imposes no affirmative duties. *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978).

tained.[80] For the district court offered no comprehensible justification for allocating 10% against GBCA (whose share of the hiring-hall wrongdoing was 0%), other than referring to unexplained "basic fairness," A. 205, and saying its allocation was "not made with mathematical precision," A. 210. Such arbitrary failure to follow any discernible legal standard cannot stand. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415-17 (1975).

In "any equity case, the nature of the violation determines the scope of the remedy." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *accord*, *Milliken* v. *Bradley*, 418 U.S. 717 (1974). Here GBCA's violation was found non-existent. There must be "tailoring a remedy commensurate to the . . . specific violations." *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 417 (1977). Corrective remedies are not available against one who was a non-violator. *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977).[81] To assess substantial, open-ended quasi-damages against a party which did no wrong flies in the face of this Court's admonition that decrees in discrimination cases must recognize the rights of persons "innocent of any wrongdoing." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 372 (1977).

IV. PENNSYLVANIA LACKS STANDING TO SUE.

Pennsylvania by its then attorney general was one of the signers of the complaint in this case. It claimed to do so "on its own behalf and on behalf of its citizens and

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[80] Nor do they come within the ordinary court costs assessed under 28 U.S.C. § 1920 and Fed. R. Civ. P. 54. The district court agreed that "litigation-related costs are distinguishable from injunctive-related costs, because their imposition serves different purposes . . . ." (A. 209-210).

[81] See also *United Mine Workers* v. *Pennington*, 381 U.S. 657, 671 (1965); *Local 20, Teamsters* v. *Morton*, 377 U.S. 252, 259-60 (1964). A court cannot arbitrarily punish when it has found no wrongdoing. *Garner* v. *Louisiana*, 368 U.S. 157 (1961); *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960).

the named plaintiffs and the class they represent, to secure the rights guaranteed by the laws of the Commonwealth of Pennsylvania and by the Constitution and laws of the United States." (J.A. 69.) Last year Pennsylvania filed a claim for $93,125.31 for attorneys' fees against Petitioner and the other defendants. (J.A. 412.)[82]

A. Pennsylvania Has No Standing To Sue on Its Own Behalf.

It is ironic, in light of § 1981's origins, for a State to claim a right to sue under it. The primary purpose of the 1866 Act was to forbid official discrimination *by States.*[83] The idea of a State as plaintiff the authors would have found baffling. There is not a hint in the debates on the 1866 Act or the 1870 Act which became § 1981 that anyone other than a victim would have a civil remedy. Because Pennsylvania was not in the class protected by 42 U.S.C. § 1981,[84] there was no jurisdiction under 28 U.S.C. §§ 1343(3) and 1343(4), which the complaint cited. (J.A. 68.)

Moreover, § 1343, which originated in the Ku Klux Klan Act of 1871,[85] gave no jurisdiction to federal courts for civil rights violations except in suits by the victim. *See* GLOBE, 42d Cong., 1st Sess. app. 216, app. 268, app. 335, 374-76 (1871). And even if § 3 of the 1866 Act had been a grant of general jurisdiction to the federal

[82] The Commonwealth's claim, under 42 U.S.C. § 1988, has not yet been ruled upon by the district court. The claim includes $4,855.00 for services of attorneys to prepare the attorneys' fees request. (J.A. 412-15.)

[83] See pp. 37-39, *supra.*

[84] Rights to equal treatment are personal, *McCabe* v. *Atchison, T.&S.F.Ry.*, 235 U.S. 151 (1914); *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948), and a "person" does not always include a State, *Quern* v. *Jordan*, 440 U.S. 332 (1979). *Cf. Cort* v. *Ash*, 422 U.S. 66 (1975).

[85] Act of April 20, 1871, c. 22, 17 Stat. 13, codified in Rev. Stat. §§ 563 (12), 629(16) and 1979. See *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600 (1979).

courts,[86] it, too, applied only to "persons who are denied . . . rights secured by the first section," which did not give rights to States.

B. Pennsylvania Has No Standing To Sue as Parens Patriae.

Pennsylvania also attempted to sue under 28 U.S.C. § 1331 "on behalf of its citizens and the named plaintiffs and the class they represent"—a theory it characterized as one of *parens patriae*. (J.A. 337.) The requirements of *parens patriae* standing under Article III were not met.

"[A] State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 665 (1976). Such sovereign interests involve such matters as protecting the state's interest in its own land, air and water, *cf. Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907); *Kansas* v. *Colorado*, 206 U.S. 46 (1907), or preventing a threat to its entire economy, *cf. Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972). There is no evidence in the record that discrimination against some operating engineers in the Philadelphia area harmed "a substantial portion of the State's population." *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 592 (1923).

Parens patriae may not be used as a cloak for a State to litigate as a volunteer the personal claims of individuals, however appealing. *Pennsylvania* v. *New Jersey*, *supra*, 426 U.S. at 665.[87] A State may not sue when relief "could be reached, without the intervention of the State, by suits instituted by the persons directly or immediately injured." *Oklahoma* v. *Atchison, T. & S.F.Ry.*, 220 U.S. 277, 289 (1911). Yet here the State explicitly sought to

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[86] It is not totally clear whether § 3 gave the federal courts general jurisdiction of suits involving § 1 or only removal jurisdiction. *Cf. Georgia* v. *Rachel*, 384 U.S. 780 (1966); *Chapman*, *supra*, 441 U.S. at 650 (White, J., concurring).

[87] See *Prince George's County* v. *Levi*, 79 F.R.D. 1 (D.Md. 1977) (rejecting *parens patriae* under § 1981).

sue in federal court *on behalf of these very plaintiffs*, who, moreover, not only have a right to sue in their own behalf but have very effectively done so.

Pennsylvania has its own laws to prevent racial discrimination,[88] and its own officers and competent courts by which to enforce them. Considering the present burdens on the federal judicial system,[89] it ill behooves a state to ask federal judges to take over its own responsibilities.

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[88] *See, e.g.*, 43 PENNA. STAT. §§ 951, *et seq.*

[89] Civil actions filed in the district courts increased from 87,321 in 1970 to 180,576 for the year ending June 30, 1981. DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, CIVIL AND TRIALS STATISTICAL TABLES TWELVE MONTH PERIODS ENDING JUNE 30, 1970-1979 at 2 (1980); ADMINISTRATIVE OFFICE OF U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 56 (1981). Some of this increase has occurred because "the federal courts have given new and expanded meaning to the requirements of standing." Burger, *Address*, June 10, 1980, in AMERICAN LAW INSTITUTE, PROCEEDINGS OF 57TH ANNUAL MEETING 33 (1981). See also Rehnquist, *Whither the Courts*, May 1, 1974, ms. unpub., at 11-12; W. BURGER, ANNUAL REPORT ON THE STATE OF THE JUDICIARY 7 (1980).

The present case is itself an example of how broad interpretations of standing and loose construction of statutes can clog the courts. The district court here not only expanded standing to let Pennsylvania sue, but also expanded the class plaintiffs' period of grievances, rejecting what it called "an overly technical view of standing" in this Court's decision in *East Texas Motor Freight System* v. *Rodriguez*, 431 U.S. 395 (1977). (A. 123.) The district court's proposed expanded interpretation of § 1981 would add more parties and causes of action to courts that have not yet recovered from the "explosion" of "thousands" of cases brought in the wake of *Jones* v. *Mayer Co.*, *supra*. Heiser, *supra* note 52.

This case also illustrates the costs and clumsiness of using a federal court as an administrative agency, when the Congress already has set up just such an agency under Title VII. This litigation is now entering its eleventh year, in what the district court says is only a prelude to "Stage II." (A. 8.) The hiring-hall agreement was signed twenty years ago, when few of the lawyers now in this case had been called to the bar. *Cf.* C. DICKENS, BLEAK HOUSE (1853).

CONCLUSION

For the reasons stated, the judgment should be reversed.

Respectfully submitted,

JOHN G. KESTER
JOHN J. BUCKLEY, JR.
Hill Building
Washington, D.C. 20006
Attorneys for Petitioner

Of Counsel:

WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

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ADDENDA

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ADDENDA

A.

THIRTEENTH AMENDMENT

[1865]

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

B.

FOURTEENTH AMENDMENT

[1868]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the

same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

C.

SENATE BILL 61,

39th Congress, 1st Session

[Section 1 as introduced]

39TH CONGRESS,
1ST SESSION.

S. 61.

IN THE SENATE OF THE UNITED STATES

JANUARY 5, 1866.

Agreeably to notice, Mr. TRUMBULL asked and obtained leave to bring in the following bill; which was read twice, referred to the Committee on the Judiciary, and ordered to be printed.

JANUARY 11, 1866.

Reported by Mr. TRUMBULL with amendments, viz: Strike out the words within [brackets] and insert those printed in *italics*.

A BILL

To protect all persons in the United States in their civil rights, and furnish the means of their vindication.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall

have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

* * * *

D.

SENATE BILL 61

39th Congress, 1st Session

[Section 1 as passed by the Senate]

[Printer's No., 20.]

39TH CONGRESS,
1ST SESSION.

S. 61.

IN THE HOUSE OF REPRESENTATIVES.

FEBRUARY 5, 1866.

Read twice, referred to the Committee on the Judiciary, and ordered to be printed.

AN ACT

To protect all persons in the United States in their civil rights, and furnish the means of their vindication.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States without distinction of color, and there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property,

and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

* * * *

E.

CIVIL RIGHTS ACT OF 1866

(Act of April 9, 1866, c. 31, 14 Stat. 27)

CHAP. XXXI.—*An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

SEC. 2. *And be it further enacted*, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction,

shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

SEC. 3. *And be it further enacted*, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so

far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

SEC. 4. *And be it further enacted*, That the district attorneys, marshals, and deputy marshals of the United States, the commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting, imprisoning, or bailing offenders against the laws of the United States, the officers and agents of the Freedmen's Bureau, and every other officer who may be specially empowered by the President of the United States, shall be, and they are hereby, specially authorized and required, at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States or territorial court as by this act has cognizance of the offence. And with a view to affording reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race or color, or previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, and to the prompt discharge of the duties of this act, it shall be the duty of the circuit courts of the United States and the superior courts of the Territories of the United States, from time to time, to increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with a violation of this act; and such commissioners are hereby authorized and required to exercise and discharge all the powers and duties conferred on them by this act, and the same duties with regard to offences created by this act, as they are authorized by law to exercise with regard to other offences against the laws of the United States.

SEC. 5. *And be it further enacted*, That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant or other process when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of the person upon whom the accused is alleged to have committed the offence. And the better to enable the said commissioners to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States and the requirements of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; and the persons so appointed to execute any warrant or process as aforesaid shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the clause of the Constitution which prohibits slavery, in conformity with the provisions of this act; and said warrants shall run and be executed by said officers anywhere in the State or Territory within which they are issued.

SEC. 6. *And be it further enacted*, That any person who shall knowingly and wilfully obstruct, hinder, or prevent any officer, or other person charged with the execution of any warrant or process issued under the provisions of this act, or any person or persons lawfully assisting him or them, from arresting any person for whose apprehension such warrant or process may have been issued, or shall rescue or attempt to rescue such

person from the custody of the officer, other person or persons, or those lawfully assisting as aforesaid, when so arrested pursuant to the authority herein given and declared, or shall aid, abet, or assist any person so arrested as aforesaid, directly or indirectly, to escape from the custody of the officer or other person legally authorized as aforesaid, or shall harbor or conceal any person for whose arrest a warrant or process shall have been issued as aforesaid, so as to prevent his discovery and arrest after notice or knowledge of the fact that a warrant has been issued for the apprehension of such person, shall, for either of said offences, be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, by indictment and conviction before the district court of the United States for the district in which said offence may have been committed, or before the proper court of criminal jurisdiction, if committed within any one of the organized Territories of the United States.

SEC. 7. *And be it further enacted*, That the district attorneys, the marshals, their deputies, and the clerks of the said district and territorial courts shall be paid for their services the like fees as may be allowed to them for similar services in other cases; and in all cases where the proceedings are before a commissioner, he shall be entitled to a fee of ten dollars in full for his services in each case, inclusive of all services incident to such arrest and examination. The person or persons authorized to execute the process to be issued by such commissioners for the arrest of offenders against the provisions of this act shall be entitled to a fee of five dollars for each person he or they may arrest and take before any such commissioner aforesaid, with such other fees as may be deemed reasonable by such commissioner for such other additional services as may be necessarily performed by him or them, such as attending at the examination, keeping the prisoner in custody, and providing him with food and lodging during his detention, and until the final determination of such commissioner, and in general for per-

forming such other duties as may be required in the premises; such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper district or county, as near as may be practicable, and paid out of the Treasury of the United States on the certificate of the judge of the district within which the arrest is made, and to be recoverable from the defendant as part of the judgment in case of conviction.

SEC. 8. *And be it further enacted*, That whenever the President of the United States shall have reason to believe that offences have been or are likely to be committed against the provisions of this act within any judicial district, it shall be lawful for him, in his discretion, to direct the judge, marshal, and district attorney of such district to attend at such place within the district, and for such time as he may designate, for the purpose of the more speedy arrest and trial of persons charged with a violation of this act; and it shall be the duty of every judge or other officer, when any such requisition shall be received by him, to attend at the place and for the time therein designated.

SEC. 9. *And be it further enacted*, That it shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and enforce the due execution of this act.

SEC. 10. *And be it further enacted*, That upon all questions of law arising in any cause under the provisions of this act a final appeal may be taken to the Supreme Court of the United States.

SCHUYLER COLFAX,
Speaker of the House of Representatives.

LA FAYETTE S. FOSTER,
President of the Senate, *pro tempore*.

In the Senate of the United States, April 6, 1866.

The President of the United States having returned to the Senate, in which it originated, the bill entitled "An act to protect all persons in the United States in their civil rights, and furnish the means of their vindication," with his objections thereto, the Senate proceeded, in pursuance of the Constitution, to reconsider the same; and,

Resolved, That the said bill do pass, two-thirds of the Senate agreeing to pass the same.

J. W. FORNEY,
Secretary of the Senate.

In the House of Representatives U. S. April 9th, 1866.

The House of Representatives having proceeded, in pursuance of the Constitution, to reconsider the bill entitled "An act to protect all persons in the United States in their civil rights, and furnish the means of their vindication," returned to the Senate by the President of the United States, with his objections, and sent by the Senate to the House of Representatives, with the message of the President returning the bill:

Resolved, That the bill do pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

EDWARD MCPHERSON, Clerk,
by CLINTON LLOYD, Chief Clerk.

F.

CIVIL RIGHTS ACT (ENFORCEMENT ACT) OF 1870

(Act of May 31, 1870, c. 114, 16 Stat. 140)

[Sections 1, 16, 17, 18]

CHAP. CXIV.—*An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

* * * *

SEC. 16. *And be it further enacted,* That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void.

SEC. 17. *And be it further enacted*, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

SEC. 18. *And be it further enacted*, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby reenacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

* * * *

APPROVED, May 31, 1870.

G.

CIVIL RIGHTS ACT (KU KLUX KLAN ACT) OF 1871

Act of April 20, 1871, c.22, 17 Stat. 13

[Section 1]

CHAP. XXII.—*An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

* * * *

APPROVED, April 20, 1871.

H.

REVISED STATUTES (1874)

[Sections 1977, 1978, 1979]

TITLE XXIV

CIVIL RIGHTS.

Sec.
1977. Equal rights under the law.
1978. Rights of citizens in respect to real and personal property.
1979. Civil action for deprivation of rights.
1980. Conspiracy.
1981. Action for neglect to prevent conspiracy.
1982. District attorney, &c., to prosecute.
1983. Commissioners.
1984. They may appoint persons to execute warrants, &c.
1985. Marshals to obey precepts, &c.
1986. Fees of district attorney, &c.
1987. Of persons appointed to execute process, &c.
1988. Speedy trial.
1989. Aid of military and naval forces.
1990. Peonage abolished.
1991. Foregoing section, how enforced.

Equal rights under the law.

31 May, 1870, c. 114, s. 16, v. 16, p. 144.

1 *Mar.*, 1875, c. 114, s. 1, v. 18, *p.* 336.

SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. [See § 535.]

Rights of citizens in respect to real and personal property.

9 April, 1866, c. 31, s. 1, v. 14, p. 27.

SEC. 1978. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Civil action for deprivation of rights.

20 April, 1871, c. 22, s. 1, v. 17, p. 13.

SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. [See §§ 563, 629.]

Respondent's Brief

1

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Nos. 81-280, 81-330, 81-331, 81-332, 81-333

In the Supreme Court of the United States

October Term, 1981

GENERAL BUILDING CONTRACTORS ASSOCIATION, et al.,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT, COMMONWEALTH OF PENNSYLVANIA

JOEL M. RESSLER
LOUIS J. ROVELLI
MARGARET HUNTING
Deputy Attorneys General, Counsel of Record for Respondent, Commonwealth of Pennsylvania

LeROY S. ZIMMERMAN
Attorney General

Office of Attorney General
1545 Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 787-5050

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

QUESTIONS PRESENTED

1. Whether, for purposes of injunctive relief, Petitioners were properly held vicariously liable under 42 U.S.C. §1981 for the intentionally discriminatory conduct of the union to which Petitioners delegated, through the union's exclusive hiring hall, the function of employee selection?

2. Whether, for purposes of injunctive relief, Petitioners were properly held vicariously liable under 42 U.S.C. §1981 for the intentionally discriminatory conduct of a joint apprenticeship and training program which, with the union, Petitioners jointly created and operated?

3. Whether the District Court properly certified a defendant class of employers and employer associations each of whom were parties to or bound by the collective bargaining agreement which established the exclusive hiring hall used to intentionally discriminate aganst minorities?

4. Whether the District Court properly imposed its injunctive decree upon Petitioners as well as the union?

5. Whether the Commonwealth of Pennsylvania had standing to maintain this action?

To the extent that other issues are raised by these appeals, the Commonwealth shall refer the Court to and rely upon the arguments presented in the Brief of the Individually Named and Class Respondents.

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STATEMENT OF THE CASE

I. Introduction

In November of 1971, twelve black plaintiffs suing on behalf of a class of minority workers involved in or seeking admittance to the operating engineers trade in Eastern Pennsylvania and Delaware, together with the Commonwealth of Pennsylvania suing on behalf of itself, its citizens, and the class of minority workers, filed the instant employment discrimination suit. Named as Defendants were Local 542, International Union of Operating Engineers, Glasgow, Inc., representing a class of employers with whom Local 542 maintains an exclusive hiring hall, four contractor associations sued individually and as representatives of a class of all employer associations which have negotiated collective bargaining agreements with Local 542, and the Joint Apprenticeship and Training Committee, an entity created by Local 542 and the contractor associations for the induction of new operating engineers.

Central to each of the claims which plaintiffs asserted against the various defendants[1] is Local 542's func-

[1] Plaintiffs' complaint pled claims for relief against Local 542 for violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, Section 1 of the Civil Rights Act of 1866, 42 U.S.C. §1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, the Union's duty of fair representation under the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, and for conspiring with the employers and the employer associations in violation of 42 U.S.C. §1985(3).

tion as an exclusive hiring hall in its geographical area. Through the hiring hall system—a creation and element of collective bargaining agreements between Local 542 and the contractor associations since 1961—the contractors delegated to Local 542 control over entry into the operating engineers trade and over referral of operating engineers to jobs. The contractors did not, however, relinquish power to affect the union's operation of the hiring hall, for the terms of the contract remained enforceable in the event they were violated by those operating the hall. (PA. 23-30).[2]

Plaintiffs proved at trial and the District Court found that, primarily through its control and operation of the exclusive hiring hall, Local 542 systematically excluded minority workers from the operating engineers trade and systematically denied to those few minority workers admitted into the trade the same right to referrals, jobs, wages, hours and other conditions of employment afforded similarly situated whites (PA. 50-94). The exclusion of minority workers from the operating engineers trade was further accomplished, as the District Court

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Plaintiffs' claims against the employers and the employer associations were predicated on their violations of both 42 U.S.C §§1981 and 1985(3). Plaintiffs' claims against the Joint Apprenticeship and Training Committee were predicated on Title VII as well as 42 U.S.C. §§1981 and 1985(3).

Plaintiffs also pled claims for relief against all defendants for violations of the Pennsylvania Human Relations Act, 43 P.S. §951 *et seq.*

[2] The reference "PA." is to the Appendix accompanying the Petitions for Certiorari of United Engineers & Constructors, Inc., Glasgow, Inc., Bechtel Power Corporation, United Contractors Association, Contractors Association of Eastern Pennsylvania (Nos. 81-330/3). The reference "JA." is to the Joint Appendix filed following this Court's grant of certiorari.

found, by discrimination in the joint apprenticeship program (PA. 121-127), by discrimination against graduates of the state and federally funded Benjamin Franklin training programs[3] (PA. 37-40), and by Local 542's systematic misrepresentation of its minority membership to federal officials for the purpose of avoiding coverage under the Philadelphia Plan[4] thereby maintaining minority representation in the union at a far lesser level than it would have been had the Philadelphia Plan been applied (PA. 30-36). The District Court further found that the contractor associations were at least reckless participants in the union's scheme of misrepresenting its minority membership to federal officials (PA. 36-37).

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[3] Benjamin Franklin I and II ("BF I and II") were programs funded by the federal government and the Commonwealth of Pennsylvania to train groups of hard core unemployed males to become operating engineers. In addition to certain differences in the criteria by which applicants qualified for the program, BF II differed from BF I in that the contractors were required to contribute to the financing of the program as a condition of continued eligibility to bid on federal-state highway contracts. (PA. 39).

[4] The Philadelphia Plan was an affirmative action program promulgated by the United States Department of Labor pursuant to Executive Order No. 11246 which required that contractors on federal and federally assisted construction projects in the five county Philadelphia area adhere to federally established minority utilization goals and timetables for six specified skilled trades. One trade not subject to the Plan was the operating engineers.

The operating engineers trade was excluded principally because of representations regarding minority membership made by Local 542 both directly to federal officials and as part of an agreement between the union and the contractor associations which established an affirmative action program designed, and approved by the U.S. Department of Labor, as a method alternative to the Philadelphia Plan for complying with Executive Order No. 11246.

II. Procedural History

This suit had its origins in two classwide charges of racial discrimination filed against Local 542 with the Equal Employment Opportunity Commission (EEOC) in 1968 and 1969. The first, filed by an EEOC Commissioner, charged that Local 542 discriminated against blacks in membership, referrals, admissions to its apprenticeship program and by other specified acts which deprived blacks of equal employment opportunities (PA. 41-42). The second, filed *pro se* by two of the named plaintiffs and one of the class plaintiffs herein, charged that Local 542 refused to refer them and other black graduates of the Benjamin Franklin I program to jobs on the same basis as similarly situated whites (PA. 42).

Following investigation, the EEOC, in two decisions issued August 30, 1971, concluded that reasonable cause existed to believe that Local 542 discriminated against blacks in apprenticeship, membership and referrals (PA. 42-43). Attempts at conciliation proved unsuccessful and, on October 14, 1971, the EEOC transmitted right to sue letters. Within thirty days thereafter, the named and class plaintiffs herein, along with the Commonwealth, filed their complaint.

On plaintiffs' motion, the District Court, on March 13, 1972, certified the case as a bilateral class action, the plaintiff class consisting of all skilled, partially-skilled and unskilled minority operating engineers who were or wished to be affiliated with Local 542, the defendant class consisting of all employers and employer associations who, as a result of their collective bargaining agreements with Local 542, had relied or would rely on Local 542's hiring hall (PA. 15-17). Both classes were certified pursuant to

Rule 23(b)(2) of the Federal Rules of Civil Procedure. All members of the defendant class were notified by certified mail, on December 27, 1973, of the pendency of the litigation, the allegations of the complaint and the relief sought (JA. 121-123).

The discovery phase of the case proceeded for four years. Prior to trial, which began in January of 1976 and continued for eighteen months, the District Court, because of the factual complexity of the case, entered an order bifurcating the trial into two stages: the first on the issue of liability and the second, if liabilty were found, on the issues pertinent to recovery of damages. The liability stage was designed to adjudicate the pervasive issue of whether the collectively bargained hiring hall system operated on a classwide basis to deny minorities equal access to the trade and to jobs as operating engineers.

III. The Liability Opinion, Judgment and Decree

In its liability opinion[5] entered and impounded on November 30, 1978, and released from impoundment on January 2, 1979, the District Court, after making detailed findings of fact and credibility, held that both Local 542 and the Joint Apprenticeship Training Committee (hereinafter referred to as the JATC) had intentionally discriminted against plaintiffs in violation of Title VII and 42 U.S.C. §1981. In addition, focusing its opinion on classwide issues only, the District Court held the contractors and contractor associations liable injunctively under 42 U.S.C. §1981 based upon their contractual relationship and use of the hiring hall system which in practice effectuated intentional discrimination.

[5] 469 F. Supp. 329.

In its Judgment and Decree[6] entered and impounded on August 8, 1979, and released from impoundment on November 7, 1979, the District Court ordered affirmative relief to remedy discrimination in entry, referral and hours. From that Decree (and from several Post Decree Orders amending the Decree), appeals were taken to the United States Court of Appeals for the Third Circuit by each of the named defendants and by several unnamed members of the defendant class.

IV. Decisions of the Court of Appeals

The appeals were consolidated and initially heard by a panel of the Court, then reargued *en banc*. On May 19, 1981 the Third Circuit issued two separate decisions. It unanimously upheld the District Court's liability holding for those portions of the judgment and decree that applied against Local 542 and the JATC.[7] That decision has not been appealed. By an equally divided vote, it affirmed without opinion the holding of liability and the imposition of injunctive relief against the class of contractor associations and employers.[8]

Local 542 and the JATC chose not to appeal further the District Court's finding of intentional discrimination. The remaining appellants filed petitions for writs of certiorari with this Court. Separate petitions were filed by the General Building Contractors Association, Inc. (hereinafter "GBCA") (No. 81-280), United Engineers and Constructors, Inc. (No. 81-330), the Contractors Association of Eastern Pennsylvania and United Contractors Association (hereinafter "CAEP" and "UCA") (No. 81-331), Glas-

[6] 502 F. Supp. 7.

[7] 648 F.2d 922.

[8] 648 F.2d 923.

gow, Inc. (No. 81-332), and Bechtel Power Corporation (No. 81-333). On October 19, 1981, this Court granted the petitions and consolidated the case.

V. Statement of Relevant Facts

At the heart of this case is the collectively bargained exclusive hiring hall for the employment of operating engineers which Local 542 has operated since 1961. The District Court found that the Union, in its operation of the hiring hall, intentionally discriminated against minorities. Petitioners have attributed that discrimination solely to Local 542. They are mistaken. The hiring hall could never have functioned without the approval and involvement of the employers and the contractor associations. Nor could the pattern and practice of discrimination against minorities have succeeded without the industry's acceptance and utilization of discriminatory referrals from the union. In other respects too, the employers and contractor associations were far more than innocent bystanders.

The hiring hall arrangement was and has been a joint venture between the union, the associations, and the employers. It was created as a result of negotiations between the union and the associations and has become a standard agreement to which all employers adhere (PA. 29-30). Under the agreement, the hiring hall replaced the system of direct application and became the only method by which new workers could enter the craft and by which persons affiliated with the union could obtain jobs (PA. 191). When the federal government proposed changes to the agreement to provide equal employment opportunities for minority operating engineers, the associations voluntarily chose to continue their exclusive reliance

on Local 542 (PA. 30). The result of that exclusive reliance, as revealed in the collective work force of the employers, was a denial of jobs and wages to qualified and available minorities.

The contractor associations, including Petitioners CAEP, UCA, and GBCA, participated with Local 542 in the deceptions that caused the United States Department of Labor to exclude the operating engineers craft from the coverage of the Philadelphia Plan (PA. 30-37). Had those deceptions not succeeded, "the Philadelphia Plan would have resulted in a higher number of minority group members in the union and in the related industry" (PA. 36). In commenting on the associations' conduct, the District Court stated that the associations "demonstrated a reckless disregard for equal employment opportunity for minorities. . ." (PA. 128).

The associations, acting on behalf of not only their own members, but also for all other Local 542 employers, participated with the union in three training programs which were part of a craft-wide affirmative action program designed to admit new minorities to the trade and upgrade the skills of minorities already affiliated with Local 542 and to serve as a substitute for the Philadelphia Plan. These programs, known as Operation Stepping Stone and Benjamin Franklin I and II, were financed principally by the federal government and the Commonwealth of Pennsylvania.[9] These programs failed as a consequence of defendants' intentional discrimination.

As early as 1963, several contractor associations accused Local 542 of racial discrimination, yet, not only that year but every year thereafter, the associations continued

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[9] The Commonwealth of Pennsylvania required the contractors to contribute $80,000 towards the cost of Benjamin Franklin II.

to execute agreements containing the exclusive hiring hall provision and took no meaningful steps to investigate or resist the discrimination. The District Court found that, although they had the "collective capacity" to be conscious of that discrimination, "the evidence reveals they did nothing whatsoever." (PA. 192).

Finally, the JATC, which the District Court found, in a finding not challenged here, engaged in a pattern and practice of racial discrimination against minorities, was jointly established in 1965 by Local 542 and the contractor associations to provide an industry-wide method of apprenticeship training. The JATC's operations are directed by an equal number of employer and union trustees who are legally responsible for the program's administration.

SUMMARY OF ARGUMENT

These appeals do not challenge the Third Circuit's unanimous affirmance of the District Court's ruling that Local 542 and the JATC intentionally discriminated against minorities in violation of 42 U.S.C. §1981. Accordingly, Petitioners' efforts to demonstrate that a violation of §1981 requires a finding of intent are irrelevant. Properly stated, the issue before this Court is whether, under the facts of this case, the courts below properly held that, for purposes of injunctive relief, Petitioners are vicariously liable for the intentional discrimination of Local 542 and the JATC.

Petitioners were properly held vicariously liable because they were joint participants with Local 542 in the exclusive hiring hall and the JATC, both of which were joint enterprises used to intentionally discriminate against minorities. Petitioners were properly held vicariously liable also because they breached their nondelegable duty under §1981 not to discriminate against minorities in hiring.

The concept of vicarious liability premised upon theories such as joint enterprise and breach of a nondelegable duty was well established at common law when Congress enacted §1981; and there is not a whisper of evidence to indicate that Congress intended to preclude the proper application of vicarious liability in cases where that section is violated.

The applicability of vicarious liability to §1981 is in no way undermined by this Court's decision in *Monell*. Indeed, *Monell* supports the applicability of vicarious liability to §1981 in that the decision is premised upon the

rejection by a later Congress of attempts to expand beyond common law concepts the bases on which a municipality may be held vicariously liable for a violation of 42 U.S.C. §1983.

The association petitioners are no less liable under the facts of this case than the employer petitioners. Though they did not directly employ operating engineers, they acted as the employers' agent in the collective bargaining which created the exclusive hiring hall; they joined with Local 542 in the establishment and operation of the JATC; they participated in the negotiations which led to the exemption of the operating engineers trade from the Philadelphia Plan; they signed the affirmative action plan intended as a substitute and they failed to honor their commitments thereunder.

Petitioners, moreover, cannot escape liability by speculatively forecasting the demise of the hiring hall system; and it is certainly no defense to a violation of §1981 that hiring halls are not outlawed by the National Labor Relations Act.

The District Court properly certified the defendant class under Federal Rule 23. The commonality and typicality requirements of Rule 23(a) were met since the only legal issue concerning the class was whether its members could be held vicariously liable for the intentionally discriminatory acts of the union to which they had delegated, through the exclusive hiring hall, the role of employee selection. As to that sole legal issue, there was no antagonism between members of the defendant class since they were all similarly situated in seeking to avoid liability. And, given the District Court's unchallenged finding that counsel for the class representative was competent, it cannot seriously be questioned that the class was adequately represented.

Contrary to Petitioners' contention, Rule 23(b)(2) clearly permits defendant class actions. Numerous federal courts have so held and, indeed, this Court implicitly so held in *Lee v. Washington*. Also contrary to Petitioners' contention, due process does not require that a summons and complaint be served upon each member of the defendant class.

The injunction fashioned by the District Court to remedy the discrimination for which Local 542, the JATC and Petitioners were held liable was well within the Court's equitable power. Even if the employers and associations were not properly held vicariously liable, it was necessary for the Court to include them in its decree—and proper to do so under the All Writs Act—since it would otherwise be impossible to ensure that there would be no repeat of the discriminatory practices which gave rise to this suit.

Finally, Pennsylvania clearly has standing, both in its proprietary and *parens patriae* capacities, to maintain this action. Pennsylvania's funding of the Benjamin Franklin programs and its public policy against discrimination in employment independently support its standing in this case. Furthermore, considerations of national public policy mandate that states be permitted to bring actions to secure to their citizens the civil rights guaranteed by federal law.

ARGUMENT

I. The Courts Below Properly Held Petitioners Vicariously Liable Under 42 U.S.C. §1981 for the Intentional Discrimination of Local 542 and the JATC

Petitioners argue at length that a judgment of liability under 42 U.S.C. §1981 requires a finding of intent to discriminate. That issue, however, is not relevant to this appeal.[10] The District Court found, the Court of Appeals affirmed and Petitioners do not challenge that Local 542 and the JATC intentionally discriminated. The issue before this Court is whether, under the facts of this case, the courts below properly held that, for purposes of injunctive relief, Petitioners are vicariously liable for the intentional discrimination of Local 542 and the JATC.

Holding Petitioners vicariously liable for the intentional discrimination of Local 542 and the JATC is in no sense inconsistent with a requirement that intent be proven to establish a violation of §1981. It is well settled in English and American jurisprudence that an otherwise innocent party may be held vicariously liable for the intentional tort of another,[11] *Limpus v. London General Omnibus Co.*,

[10] It is noteworthy that Petitioners Glasgow, Inc. and Bechtel Power Corporation conceded before the Third Circuit that it was unnecessary in this case to resolve the issue of whether §1981 required proof of intentional discrimination. *See* Brief for Glasgow, Inc., No. 80-2161, at 14; Brief for Bechtel Power Corporation, No. 80-2163, at 31. Hence, Respondents never briefed nor argued the issue below.

[11] When §1981 was enacted by the 39th Congress as part of Section 1 of the Civil Rights Act of 1866 the concept of vicarious liability was long embedded in Anglo-American jurisprudence.

1 H&C 526, 158 Eng. Rep. 993 (1862); *Philadelphia and Reading R.R. Co. v. Derby*, 14 How. (55 U.S.) 468 (1852), and §1981 clearly defines a species of tort. *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979).

That a party may be held vicariously liable for violation of a statutory provision requiring proof of intent is readily evident in cases decided under Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3).[12] *See, e.g., NLRB v. H. K. Ferguson Co.*, 337 F.2d 205 (5th Cir. 1964), *cert. denied*, 380 U.S. 912 (1965). Indeed, Section 8(a)(3) has been interpreted as imposing vicarious liability whether or not the party held vicariously liable knew or should have known of the illegal conduct. *Morrison-Knudsen Co. v. NLRB*, 275 F.2d 914 (2d Cir. 1960), *cert. denied*, 366 U.S. 909 (1961).[13]

The adoption of vicarious liability has been traced to a series of decisions of Lord Holt dating from the close of the 17th century. *Tuberville v. Stampe* (1697), Com. 459, 1 Salk. 13, Ld. Raym. 264; *Middleton v. Fowler* (1699), 1 Salk. 282; *Jones v. Cotton* (1701), 12 Mod. 489; *Hern v. Nichols* (1708), 1 Salk. 289, 91 Eng. Rep. 256.

In the absence of specific language on the part of Congress to the contrary, federal courts must apply the traditional common-law rules of vicarious liability in interpreting federal statutes. *Amoco Oil Co. v. Environmental Protection Agency*, 543 F.2d 270, 275-76 (D.C. Cir. 1976).

[12] Section 8(a)(3) makes it an unlawful labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .". 29 U.S.C. §158(a)(3). A violation of §8(a)(3) requires proof of intent. *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954).

[13] *Accord, NLRB v. Local 322, IBEW*, 597 F.2d 1326 (10th Cir. 1979); *Pacific Maritime Association v. NLRB*, 452 F.2d 8 (9th Cir. 1971); *NLRB v. H. K. Ferguson Co.*, 337 F.2d 205 (5th Cir. 1964), *cert. denied*, 380 U.S. 912 (1965); *see also, Frank Mascali Construction Company*, 251 NLRB 219 (1980).

A. As participants with Local 542 in joint enterprises in which Local 542 intentionally discriminated, Petitioners were properly held vicariously liable for Local 542's intentionally discriminatory conduct.

In a joint enterprise, such as a partnership, the individual participants are liable jointly and severally for the actions of the venture.[14] In this case, Petitioners participated in two joint ventures that were used to intentionally discriminate against minorities in violation of §1981. The first of these was the exclusive hiring hall created through collective bargaining between the associations and Local 542. Petitioners clearly had just as strong an interest as the union in the hiring hall's purpose of allocating jobs to operating engineers. Petitioners also had the requisite right to control the venture through the conditions they placed in the collective bargaining agreement.[15]

Petitioners' argument that *Morrison-Knudsen* is being misinterpreted is without merit. *See, Pacific Maritime Association v. NLRB, supra.* Furthermore, those cases that Petitioners rely upon, *NLRB v. Master Stevedores Association of Texas,* 418 F.2d 140 (5th Cir. 1969) and *Lummus Co. v. NLRB,* 339 F.2d 728 (D.C. Cir. 1964), involved back pay as opposed to injunctive liability.

[14] Harper and James, *The Law of Torts,* §26.13, p. 1413. The test for finding a joint enterprise is whether there is a mutual interest in the purpose of the venture and a mutual right of control in directing that venture. *Id.* at p. 1414.

[15] It is irrelevant that Petitioners did not control the day to day operation of the hiring hall. Such was a function of the particular agreement which Petitioners concluded with Local 542. The agreement could have been drafted differently so as to give Petitioners a larger role; and, even under the agreement in force, they retained the power to seek enforcement of terms which, had the union observed them, would have precluded the discrimination for which the union and Petitioners have been held liable.

The second joint enterprise was the JATC which, as its name indicates, was (and is) an entity established and operated jointly by Petitioners and Local 542. Of the six trustees legally responsible for the conduct of the JATC's affairs, three are appointed by Petitioners. As participants in the creation and operation of the JATC, Petitioners cannot escape the vicarious liability which, by operation of law, follows from the JATC's intentionally discriminatory conduct.

B. Petitioners were properly held vicariously liable for breach of their nondelegable duty not to discriminate.

One who entrusts to an agent the performance of a nondelegable duty is liable for the agent's failure to perform the duty whether or not due care was exercised in making the delegation. Restatement of Agency 2d §214. Lord Blackburn summarized the rule in *Dalton v. Angus*, 6 App. Cases 740, 829 (House of Lords 1881).

> A person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it.

Liability is imposed whether the agent's failure to discharge the duty is negligent, intentional or indeed criminal. *American Cotton Co-op. Assoc. v. Union Compress and Warehouse Co.*, 193 Miss. 43, 57, 7 So. 2d 537, 540 (1942); Restatement of Agency 2d §214.[16]

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[16] *See also, Truck Leasing Corp. v. Esquire Laundry and Dry Cleaning Co.*, 252 S.W. 2d 108 (Mo. App. 1952); *Greb v. Pennsyl-*

A nondelegable duty may be created by common law, by contract, by franchise or charter, or by statute.[17] In the instant case, the courts below found that §1981 imposed such a duty upon Petitioners. The statute provides that

> All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . .

Enacted pursuant to the Thirteenth Amendment, [18] §1981 gave minorities the right under federal law to enter into employment contracts on the same terms as whites. And, since for every right created a correlative duty is also created, §1981 imposed upon employers a duty to afford minorities the same right as whites to contract for employment with them. It follows therefore from the District Court's finding that minorities were not afforded the same rights as whites to be employed as operating engineers that the employers breached their duty. The fact that the employers used Local 542 and the associations as their agents in the hiring process does not alter their liability; it simply creates joint liability.

While *Runyon v. McCrary*, 427 U.S. 160 (1976), and *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), establish that §1981 prohibits racial discrimination by private employers, this Court has never ruled on whether the duty created by §1981 falls within the scope

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vania R.R. Co., 41 Pa. Superior Ct. 61 (1909); *New York Central Railroad Co. v. United States*, 212 U.S. 481, 492-4 (1909).

[17] Harper and James, *supra* at p. 1406; Prosser, *Law of Torts* (4th Ed. 1971), p. 470.

[18] What is now §1981 was originally enacted along with what now is codified as 42 U.S.C. §1982 as Section 1 of the Civil Rights Act of 1866. Both sections were re-enacted in Section 18 of the Voting Rights Act of 1870, after ratification of the Fourteenth Amendment.

of the doctrine of nondelegable duty. Cases decided under analogous provisions however, such as the 14th Amendment and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, support the conclusion of the courts below that §1981 established such a duty.

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), this Court held the defendant Authority liable for race discrimination because of the refusal of a restaurant, located in leased space in a parking garage owned and operated by the Authority, to serve black patrons. Observing that both parties benefitted from their leasehold arrangement, the Court held the Authority and restaurant jointly liable notwithstanding that the Authority had no involvement in the restaurant's discrimination.

> No state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The state has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity. . . .

Id. at 725. Other cases holding a government entity vicariously liable under the 14th Amendment for private discrimination include *Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957) (courthouse cafeteria refused to serve blacks); *Adams v. New Orleans*, 208 F. Supp. 427 (E.D. La. 1962) (restaurant in a municipal airport); and *Jones v. Marva Theatres, Inc.*, 180 F. Supp. 49 (D. Md. 1960) (theater in city hall built as place of public assembly).

Each of the foregoing cases necessarily involves a government entity because of the state action requirement of the Fourteenth Amendment. Yet the same principle has been applied in a number of cases to hold private entities vicariously liable for race discrimination.

In *Myers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977), *cert. dismissed*, 434 U.S. 801 (1977), an international union was held liable for the perpetuation of discrimination by its local's collective bargaining agreements, even though the local was not its agent and it was not a signatory to the contracts. The court held that since the International furnished advisors who would review and comment on the local's bargaining positions and required that locals submit to it for approval the final bargaining agreement, there was a sufficient connection to uphold liability on the basis of the International's breach of its "affirmative duty to take corrective steps to prevent the perpetuation of past discrimination." *Id.* at 850.

In *Kaplan v. Intern. Alliance of Theatrical and Stage Employees*, 525 F.2d 1354 (9th Cir. 1975), the International was held liable for a discriminatory contract provision although its only involvement with its local was the approval of membership applications. "The policies embodied by Title VII demand that an international union closely scrutinize the practices of its local affiliates to reveal discriminatory acts or consequences." *Id.* at 1360.

A union's failure to seek a non-discrimination clause in its bargaining agreement was grounds for liability in *Macklin v. Spector Freight Systems*, 478 F.2d 979 (D.C. Cir. 1973). "It would undermine Title VII's attempt to impose responsibility on both unions and employers to hold that union passivity . . . cannot constitute a violation of the Act." *Id.* at 989.

Other cases establishing the non-delegable nature of the duty not to discriminate are *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976) (International liable under both Title VII and §1981); *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973) ("Title VII requires that both union and employer represent and protect the best interests of minority employees"); and *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971).

Just as these cases demonstrate that neither a local nor an international can avoid liability for failure to take action to eliminate discriminatory practices, "neither can the employer use the union or unions for a shield." *Carey v. Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974). *Cf., Mazus v. Commonwealth of Pa.*, 629 F.2d 870, 880 (3d Cir. 1980) (dissenting opinion by Judge Sloviter), *cert. denied*, 449 U.S. 1126 (1981) (an employer cannot defend its discriminatory hiring practices by relying on an employment agency).

It was precisely this fear that employers could erect a screen and thus avoid liability that prompted the English courts to extend vicarious liability to willful torts in *Limpus v. London General Omnibus Co., supra.*[19] Indeed, this Court had already imposed liability under a similar fact situation. *Philadelphia and Reading R.R. Co. v. Derby*, 14 How. (55 U.S.) 468 (1852).

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[19] See Laski, Basis of Vicarious Liability, 26 Yale L.J. 105, 119 (1916).

C. This Court's decision in Monell has no relevance to the case at Bar.

Contrary to Petitioners' assertions, this Court's rejection of *respondeat superior* in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), does not compel a similar result here. *Monell* held that municipalities could not be liable under a theory of *respondeat superior* for alleged violations of 42 U.S.C. §1983. The doctrine was held inapplicable based upon consideration of the legislative history of the Civil Rights Act of 1871, in particular the House's rejection of the Sherman Amendment.[20]

After ruling that the plain language of §1983 covered a municipality's own violations of the 14th Amendment, this Court then reached the issue of *respondeat superior* and concluded that the rejection of the Sherman Amendment precluded application of *respondeat superior* to municipalities.

> Creation of a federal law of *respondeat superior* would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it

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[20] An amendment sponsored by Senator Sherman would have imposed liability on a municipality for failing to prevent riots whether or not it had notice of the impending riot, whether or not the municipality was authorized to exercise police power, whether or not it exercised all reasonable efforts to stop the riot, and whether or not the rioters were caught and punished. The amendment was defeated in the House, its opponents claiming it would be unconstitutional for the federal government to impose an obligation on municipalities to keep the peace if the municipalities were neither so obligated nor so authorized by their state charters.

> thought imposition of such an obligation unconstitutional.

436 U.S. at 693.

Monell's rejection of *respondeat superior* in §1983 suits was explicitly premised on Congress's rejection of the only form of vicarious liability presented to it, the Sherman Amendment. The 42nd Congress's rejection of the Sherman Amendment cannot, of course, be used to determine the intent of the 39th Congress in passing the Civil Rights Act of 1866, which was codified as 42 U.S.C. §§1981 and 1982.

In contrast to §1983, which was purely remedial in character, *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617-18 (1979), §1981 was the first legislation enacted to enforce the Thirteenth Amendment's affirmative declaration that all vestiges of slavery are illegal, *District of Columbia v. Carter*, 409 U.S. 418 (1973). Section 1981 created new federal rights. *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975); *Sethy v. Alameda County Water District*, 545 F.2d 1157, 1161 (9th Cir. 1976). Congress could have but did not impose limits on the duties created by the statute.

> There is nothing in [section 1981] which even hints at a congressional intention that the employer is not to be liable if one of its employees, acting in the course of his employment, commits the tort. Such a rule would create an enormous loophole. . . . The usual rule, that an employer is liable for the torts of its employees, acting in the course of their employment, seems to be just as appropriate here as in other cases. . . .

Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979). Just as Senator Sherman attempted to expand the concept of vicarious liability beyond common law prin-

ciples to make a municipality liable under §1983 for the acts of any of its citizens, Congress could have restricted the applicability of common law vicarious liability principles under §1981. *Cf. City of Newport v. Fact Concerts, Inc.*, —— U.S. ——, 101 S.Ct. 2748, 2758 (1981) ("given that municipal immunity from punitive damages was well established at common law by 1871, we proceed on the familiar assumption that Congress would have specifically so provided had it wished to abolish the doctrine") (citation omitted); *Owen v. City of Independence, Mo.*, 445 U.S. 622, 643-4 (1980) (Congress recognized that municipal corporations were commonly held liable in tort for the acts of their agents and if good faith immunity were a defense under common law, it would have been raised by §1983's opponents).

In light of the different constitutional bases for the two statutes, *District of Columbia v. Carter, supra,* their enactment by different Congresses, the different purposes of the two statutes, the absence of any legislative history indicating an intent to restrict common law principles of vicarious liability, and the fact that the concerns expressed during the debate over the Sherman Amendment do not apply to vicarious liability imposed upon private citizens, this Court's decision in *Monell* regarding *respondeat superior* under §1983 in no way undermines the applicability of vicarious liability to violations of §1981. *Cf., Runyon v. McCrary,* 427 U.S. 160, 186 (1976) (Powell, concurring) ("I consider the posture of §§1981 and 1982 in the jurisprudence of this Court to be quite different from that of §1983").

D. The associations, no less than the employers, are vicariously liable.

The associations contend that they, apart from the employers, should be exonerated because they were not responsible for the union's discriminatory operation of the hiring hall and, in particular, because they employed no operating engineers and, as such, made no use of the hiring hall. The defect in their argument is that, for purposes of liability, the associations are indistinguishable from the employers. It was the associations, after all, who acted as the agent of the employers in the collective bargaining that resulted in the exclusive hiring hall through which minorities were denied equal access to operating engineer jobs. It was the associations who joined with Local 542 in establishing and operating the JATC which intentionally discriminated against minorities. It was the associations who participated in the negotiations leading to the exemption of the operating engineers trade from the Philadelphia Plan, who signed the affirmative action plan intended as a substitute and who failed to honor their commitments thereunder. Finally, it was the associations who failed to demand that Local 542 abide by the terms of the collective bargaining agreement.

Having participated directly in the establishment and perpetuation of the system employed to deprive minorities of their §1981 rights, the associations cannot shield themselves from liability simply because they were the representatives of the employers, rather than the employers, of operating engineers. *Compare, NLRB v. Waterfront Employers of Washington,* 211 F.2d 946, 954 (9th Cir. 1954); *Byrd v. Local 24, IBEW,* 375 F. Supp. 545, 560-2 (D. Md. 1974); *Williams v. New Orleans Steamship Association,* 341 F. Supp. 613 (E.D. La. 1972).

E. Petitioners' speculative concerns as to the vitality of the hiring hall system are irrelevant to Petitioners' liability under §1981.

Petitioners contend that the imposition of vicarious liability upon employers who use a hiring hall will destroy the hiring hall system and that the destruction of that system will cause labor strife contrary to the policy of the federal labor laws. Considering, however, Petitioners' resistance to the hiring hall's creation and perpetuation,[21] their forecast of doom is rather suspect. And more importantly, their contention is entirely speculative;[22] it is unsupported by any evidence in the record and, as a matter of law, it is wholly irrelevant.

Even assuming *arguendo* that the imposition of liability upon Petitioners threatens the vitality of the hiring hall system, the denial of civil rights secured to minorities by §1981 is a legally impermissible price to pay to ensure that system's perpetuation. While the National Labor Relations Act has been interpreted as permitting exclusive

[21] By their own testimony, Petitioners acceded to the hiring hall's establishment only under the coercion of a ten week strike in 1961. They also sought through an arbitration action against Local 542, initiated upon the District Court's issuance of its liability opinion, to secure a ruling that they were no longer bound to use the hiring hall. (Indeed, they prevailed in their arbitration action, though the District Court stayed the award because it would have interfered with the Court's remedial decree.) (JA. 381-384).

[22] Similar claims were made following the Second Circuit's 1960 decision in *Morrison-Knudsen* holding employers vicariously liable both injunctively and monetarily for a union hiring hall's intentional discrimination against non-union members. Twenty years have passed, however, and the hiring hall system is as vital as ever.

hiring halls,[23] it has never been interpreted as exempting employers who use hiring halls from the mandate of the civil rights laws. *See, e.g., United States v. Int'l Union of Elevator Constructors, Local* 5, 538 F.2d 1012 (3d Cir. 1976); *Contractors Association of Eastern Pa. v. Secretary of Labor,* 442 F.2d 159 (3d Cir. 1971), *cert. denied,* 404 U.S. 854 (1971).

The employers, acting through the associations, made a business decision to use an exclusive hiring hall. They thereby obtained substantial benefits;[24] they also incurred certain risks. The employers' decision to use the hiring hall and to fail to monitor its operation, in light of the history of employment discrimination in the construction industry, *United Steelworkers of America v. Weber,* 443 U.S. 193, 198, n. 1 (1979), created the possibility of liability if the hiring hall was operated in a discriminatory fashion. Now that that risk has materialized, the employers cannot escape the consequences of their decision.

II. The Defendant Class Was Properly Certified

Petitioners Bechtel and United, employer members of the defendant class, attack the validity of the judgment against them on grounds that the District Court improperly certified the class and lacked personal jurisdiction to impose its decree on the class. They argue that the requirements of Rule 23(a) have not been met, that a defendant class may never be certified under Rule 23(b)(2), and that a court lacks jurisdiction over a defendant class in the absence of service of the summons and complaint

[23] *Local 357, Int'l Brotherhood of Teamsters v. NLRB,* 365 U.S. 667 (1961).

[24] *Id.* at 672.

on individual class members. The District Court properly rejected these arguments. *See* PA. 198-206.

A. The requirements of Rule 23(a) were met.

Rule 23 of the Federal Rules of Civil Procedure clearly provides for the possibility of defendant class actions. Section (a) states that "[o]ne or more members of a class may *sue or be sued* as representative parties . . ." and subsection (a) (3) refers to ". . . *claims or defenses* of the representative parties. . ." (Emphasis added.)[25]

Rule 23(a) specifies four prerequisites to a class action. The numerosity requirement of subsection (a) (1) has been satisfied—the defendant class includes more than 1400 employers—and Petitioners do not argue otherwise. The commonality requirement of subsection (a) (2) has been satisfied since the only legal issue concerning the defendant class at the liability stage of this proceeding was whether an employer can be held vicariously liable under §1981 for the discriminatory acts of the union to which it has delegated, through the exclusive hiring hall, the role of employee selection. Likewise, the typicality requirement of subsection (a) (3) has been satisfied since the defense of the party representative—Glasgow, Inc.—to the common issue of law was that, as a matter of law, an employer cannot be held vicariously liable for the discriminatory conduct of the union.

Petitioners argue that commonality and typicality are lacking because an individual employer cannot be held liable without individualized proof of discrimination by that employer or at least without individualized proof of

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[25] *See also* subsections (b) (1) ". . . prosecution of separate actions by *or against* individual members of the class. . ." and (b) (2) "the *party* opposing the class. . ." (Emphasis added.)

knowing participation by that employer in the union's discrimination. That argument, however, begs the issue since it does no more than to state the substantive defense to the issue of law common to all members of the defendant class and since it does no more than to state the substantive defense asserted by Glasgow, Inc. as the party representative.

The adequacy of representation requirement of subsection (a) (4) is dependent upon the qualifications of counsel for the class representative and upon whether the class representative has interests antagonistic to those of the class. *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). The District Court specifically found that the ability of Glasgow's attorneys "cannot seriously be questioned". (PA. 200).

Petitioners argue that Glasgow's interests were antagonistic to those of the defendant class. They first contend that antagonism is inherent because of the competitive nature of the construction industry. Such a fact, however, even assuming it exists, has no bearing on the adequacy of representation in the instant case.

> [I]t is well established that only a conflict that goes to the essential subject matter of the litigation—the heart of the controversy—will defeat a claim of representative status. E.g., Berman v. Narragansett Racing Ass'n., Inc., 414 F.2d 311 (1st Cir. 1969), cert. denied, 396 U.S. 1037 (1970); Redmond v. Commerce Trust Co., 144 F.2d 140 (8th Cir.), cert. denied, 323 U.S. 776 (1944).

United States v. Trucking Employers, Inc., 75 F.R.D. 682, 688 (D. D.C. 1977); *class decertified on other grounds*, 20 F.E.P. Cases 342 (D. D.C. 1979); *see also, Sperry Rand Corp. v. Larson*, 554 F.2d 868 (8th Cir. 1977); *Al*

Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43, 50 (D. Del. 1974). The subject matter of this litigation is whether the contractors are liable for race discrimination and it is in the interest of all members of the construction industry to be found not liable.

Petitioners' second contention is that "it is obviously in the interest of the named defendants to have as many contributors to the plaintiffs' recovery as possible." (United brief at 27). Such argument is, of course, assertable in all defendant class actions and is patently without merit. *Appleton Electric Co. v. Advance-United Expressways*, 494 F.2d 126 (7th Cir. 1974). Glasgow's liability is not necessarily diminished by its inclusion in a defendant class and, in any event, Glasgow's paramount interest is not to spread its liability but, as with every other class member, to avoid liability.

Next, Petitioners argue that Glasgow is incapable of litigating the individual defenses of the class members. That argument, however, is no different from the argument asserted by Petitioners with respect to commonality and typicality. On the common issue of whether or not the employers are vicariously liable for the discriminatory conduct of the union, the individual defenses of the class members are irrelevant.

Finally, Petitioners contend that Glasgow was an inadequate representative because it failed to oppose certification of the defendant class.[26] The federal courts have

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[26] Petitioners mischaracterize what happened below. As the district court's opinion makes clear: "Named defendants did oppose the defendant class certification as proposed by plaintiffs at oral argument on February 18, 1972, though they did not reject the total concept of it." (PA. 201). Furthermore, no harm occurred to Petitioners because the District Court allowed Bechtel and United to appear specially to argue against certification.

never held that a class representative was inadequate because it failed to raise any conceivable procedural point.

> To require more than representativeness as to the merits, however, as by insisting that the named parties share the views of all class members with regard to discovery and other procedural matters, or that they be able and willing to raise each and every procedural issue of interest to absentees, would rob the class action concept of its intended vitality.

United States v. Trucking Employers, Inc., 75 F.R.D. at 688.

B. The class was properly certified under Rule 23(b)(2).

Once the prerequisites of Rule 23(a) are satisfied, the Court must determine whether the proposed class meets the requirements of one of the subsections of Rule 23(b). The District Court certified the defendant class pursuant to subsection (b) (2) which permits a class action where

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole.

Petitioners claim that, as a matter of law, a defendant class may never be certified under subsection (b) (2)[27]

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[27] Petitioners' argument is contrary to this Court's decision in *Lee v. Washington*, 390 U.S. 333 (1968). In a *per curiam* decision, perhaps reflecting this Court's view of the substantiality of the question presented, the Court rejected the challenge to certification of a defendant (b)(2) class as being "without merit." Defendant classes have since been certified under (b)(2)

and refer the Court to *Paxman v. Campbell*, 612 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1129 (1981).[28] *Paxman* held that the language of (b) (2) could not be construed to permit a defendant class. Respondent submits that *Paxman* is wrong; it is, in any event, clearly distinguishable.[29]

As was aptly stated by the District Court in rejecting this argument below:

> It must be remembered that Rule 23(b) (2) . . . is not by its terms applicable only to a plaintiff class certification. Indeed, the language in 23(b) (2), 'the party opposing the class,' on its face clearly indicates

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in countless instances. *See e.g., Marcera v. Chinlund*, 595 F.2d 1231 (2d Cir. 1979), *vacated on other grounds*, 442 U.S. 915 (1979); *Thompson v. Bd. of Education of Romeo Community Schools*, 71 F.R.D. 398 (W.D. Mich. 1976).

[28] Petitioners also claim that *Adashunas v. Negley*, 626 F.2d 600 (7th Cir. 1980), held that defendant class actions may not be certified under (b)(2). That is not the case. The Seventh Circuit held that, in light of the "diverse nature of the relation between handicapped children and [the defendant] local educational agencies" and "the additional factor that the named defendants could not adequately represent other local agencies with entirely different problems," the district court did not abuse its discretion in denying certification. *Id.* at 605.

[29] The proposed defendant class in *Paxman* consisted of more than 130 school boards which "were free to adopt maternity leave policies of entirely unknown differences or similarities." *Paxman v. Campbell*, 612 F.2d at 854, n. 9. Thus there was no factual link between the defendants, other than their legal status as school boards, and the commonality requirement of Rule 23(a) was not met.

In contrast, in the instant case, there was an operative collective bargaining agreement which bound all members of the defendant class to seek employees through the Union's hiring hall thus exposing the employers to vicarious liability when that hall was used to intentionally discriminate against minorities.

> that the section was deliberately cast to include defendant class action suits. Numerous cases have upheld 23(b)(2) defendant class certifications in a variety of contexts.

PA. 203.

Paxman relied on 7A Wright and Miller, *Federal Practice and Procedure*, §1775. Numerous courts have chosen to disregard the position taken by Wright and Miller. *Gibbs v. Titelman*, 369 F. Supp. 38 (E.D. Pa. 1973), *rev'd on other grounds*, 502 F.2d 1107 (3d Cir. 1974), *cert. denied*, 419 U.S. 1039 (1974), involved an action brought against a class of motor vehicle installment sellers, sales finance companies, and collectors-repossessors seeking to have the Motor Vehicle Sales Finance Act, a Pennsylvania statutory scheme concerning the repossession of motor vehicles, declared unconstitutional. The court considered the defendants' argument that the class could not be certified under 23(b)(2) and rejected it with the following language:

> The opposing parties here are the respective classes. The defendants, as a class, have acted on grounds generally applicable to the plaintiffs' class as a whole. Action or inaction is directed to a class within the meaning of Rule 23(b)(2), even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class. See, Fed. R.C.P. 23, Notes of Advisory Committee on the Rules, 28 U.S.C.A. Rule 23. Even the threat of action by the defendants under the challenged statutes satisfies Rule 23(b)(2), since that threat is applicable to the plaintiffs' class as a whole.

Id. at 52-53. The argument was similarly rejected in *United States v. Trucking Employers, Inc.*, 75 F.R.D. 682

(D. D.C. 1977). In that case the defendant class was composed of major truck companies which were parties to or bound by the National Master Freight Agreement. The class argued that subsection (b) (2) could only apply to plaintiff classes because only a defendant's action or refusal to act on grounds generally applicable to a class can make appropriate final injunctive relief with respect to the class. The *Trucking Employers* court pointed out three flaws in that argument.

> First, the argument simply assumes its conclusion, namely, that only defendants can act on grounds generally applicable to a class and thereby make injunctive relief appropriate. Second, it neglects to consider why the drafters of Rule 23 would bother to employ a phrase so cumbersome as 'the party opposing the class' if they meant, simply, 'the defendant.' Indeed, the Court wonders how one can identify 'the party opposing the class' without asking which side the class is on. Third, the argument takes the rule out of context and, for no apparent purpose, would deprive the concept of a defendant class action of much of its utility.
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> The Court is of the opinion that section (b) (2) is designed simply to facilitate class actions in which injunctive relief plays a central role. Whether the injunction would bind all members of a defendant class or benefit all members of a plaintiff class, or both, should be of no consequence so long as the complaint raises issues common to the class.

United States v. Trucking Employers, 75 F.R.D. at 691-692 (footnote omitted).[30]

[30] The footnote pointed out that the drafters of Rule 23 also omitted specific references to plaintiff or defendant in various other portions of Rule 23.

C. The District Court had personal jurisdiction over the class defendants.

The final contention of Petitioners Bechtel and United is that they cannot be bound by the District Court's decree because the Court never acquired personal jurisdiction over them. Stripped to its essentials, their argument is that due process prohibits defendant class actions unless each member of the class receives notice through service of a complaint and summons. Since, as demonstrated in Part II B *supra*, defendant class actions are permitted under Rule 23(b)(2), Petitioners are arguing that Rule 23 is unconstitutional.[31] Petitioners are mistaken.

In a defendant class action such as this, in which the issue of liability is common to all members of the defendant class, due process is satisfied when there is adequate representation by the named class representative. *Hansberry v. Lee*, 311 U.S. 32 (1940); *Marcera v. Chinlund, supra; Alexander v. Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); *Larionoff v. United States*, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd on other grounds*, 431 U.S. 864 (1977); *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239 (3d Cir. 1975), *cert. denied*, 421 U.S. 1011 (1975).

This Court's decision in *Sosna v. Iowa*, 419 U.S. 393 (1975), leaves no doubt that the Court has concluded that requiring that notice be sent to all absent class members in a (b)(2) action is not required by due process. In that (b)(2) action, after satisfying itself that the conditions of Rule 23(a) were met, the Court stated in a footnote that "the problems associated with a Rule 23(b)(3) class

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[31] Rule 23(b)(2) does not require that notice be given to absent class members.

action [i.e. notice], which were considered by this Court last term [in *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974)], are not present in this case." *Id.* at 397, n. 4.

As the Advisory Committee's comment on revised Rule 23 pointed out: "In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum." Advisory Committee's Notes to Proposed Amendments to Federal Rules of Civil Procedure, 39 F.R.D. 69, 106 (1966). On the other hand, the cost to plaintiffs to individually serve all 1488 members of the defendant class would have been prohibitive and would have served little purpose since the District Court, "out of an abundance of caution" (PA. 16, n. 2), ordered that notice of the pendency of the action be provided to defendant class members prior to commencement of trial, yet no members sought to intervene. Surely, when the liability of each member of a defendant class is premised on identical issues of fact and law, certification of the class is consistent with the purposes behind Rule 23, *see United States Parole Commission v. Geraghty*, 445 U.S. 388, 402-03 (1980), and, so long as the class is adequately represented, due process has been satisfied.

Finally, Petitioners' argument ignores over one hundred years of case law. In 1853 this Court decided *Smith v. Swormstedt*, 16 How. (57 U.S.) 288 (1853), a case with a plaintiff class of 1500 persons and a defendant class of 3000 persons. Recognizing that the suit could not otherwise be brought, the Court allowed it to proceed as a plaintiff/defendant class action, stating:

> to prevent a failure of justice, a court of equity permits a portion of the parties at interest to represent the entire body, and the decree binds all of them the same as if all were before the court.

Id. at 302. As Chief Judge Bryant pointed out in *United States v. Trucking Employers, Inc.*, 12 E.P.D. ¶11,139 (D.D.C. 1976):

> It has long been the law in the Courts of the United States that in an otherwise proper class action suit, non-party members of the class need not be brought personally before the Court, as long as the requirements of due process—in this context, primarily notice and representativeness of named class members—are afforded them. [citation omitted]. The class action thus stands as the outstanding exception to the general rule that one is not bound by a judgment *in personam* in litigation to which he/she has not been made a party by service of process.

III. The District Court Properly Imposed Its Injunction Upon the Employers and the Associations

A. The terms of the decree were narrowly fashioned to eliminate Petitioners' discriminatory practices.

Petitioners assert that the decree was overly broad because, they contend, the discrimination found could be remedied by imposing the injunction solely upon the union. This contention, however, contradicts the factual finding of the District Court that it was necessary to impose the decree on all defendants because otherwise:

> there could be no assurance that a mandatory remedial level of hours and wages could ever result, or that strict adherence to the rules of the hiring hall would be broadly maintained by employers, or that employers as a whole could be obliged to take steps to assure an awareness of the levels of minority employment in 542's jurisdiction.

(PA. 205).

It is well settled that a District Court has broad equitable powers to remedy the effects of discriminatory practices. *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). Upon a finding of discrimination, the District Court "has not merely the power, but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States,* 380 U.S. 145, 154 (1965); *see also, International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977). In employment discrimination cases in particular, Congress has vested the District Courts with broad equitable powers "to make possible the fashion[ing of] the most complete relief possible." *Albemarle Paper Company v. Moody,* 422 U.S. 405, 421 (1975).

The District Court's purpose in this case was not to eliminate the exclusive hiring hall but rather to ensure its operation in a nondiscriminatory manner. This purpose determined the obligations the Court imposed upon the employers. By imposing employment reporting requirements upon them, the Court established a system to enable it to monitor whether the Decree's hiring goals were being met. By placing a burden on the employers in the form of potential liability if the hiring goals are not met, the Court ensured that the employers would be unable to continue their past practice of turning a blind eye to the union's discriminatory operation of the hiring hall. In so fashioning its remedy, the District Court properly tailored its remedy to fit the facts of the case. *Dayton Board of Education v. Brinkman,* 433 U.S. 406 (1977).

B. Even if Petitioners cannot be held vicariously liable under §1981, the All Writs Act vested the District Court with the authority to impose its injunction upon Petitioners.

The All Writs Act, 28 U.S.C. §1651, serves as a grant of authority to the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Consideration of whether the injunction in this case could issue pursuant to the All Writs Act must therefore focus on whether the injunction, which is merely one type of writ, was both in aid of the District Court's jurisdiction and either necessary or appropriate to conform to the usages and principles of law. 9 *Moore's Federal Practice* ¶110.26 (1981 ed.).

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1. *The District Court's Order Was in Aid of Its Previously Acquired Jurisdiction Over the Action*

While an injunction issued pursuant to the All Writs Act may not be used as a device to confer jurisdiction on a court, "ancillary jurisdiction is provided where jurisdiction is otherwise already lodged in the court." *Commercial Security Bank v. Walker Bank and Trust Co.*, 456 F.2d 1352, 1355 (10th Cir. 1972). *See also, Price v. Johnston*, 334 U.S. 266 (1948). Clearly the District Court had jurisdiction over the named parties to the action, all of whom were served with the complaint and participated in the trial.

2. The District Court Did Not Abuse Its Discretion in Finding That It Was Necessary That Petitioners Be Bound by Its Injunction

For an injunction to be properly issued pursuant to the All Writs Act, its issuance must be found to be either necessary or appropriate as an aid to the court's jurisdiction. Appellate review is limited to whether the District Court abused its discretion in making such a finding. *United States v. Moore,* 427 F.2d 1020 (10th Cir. 1970).

The District Court's lengthy findings of fact in this case amply support its conclusion that imposing its injunction on the union alone would be insufficient to guarantee adequate relief for the plaintiffs. If the hiring quotas which the injunction authorized were solely the responsibility of the union, the realization of the quotas could be frustrated (either intentionally or unintentionally) by the employers through their exercise of the right to reject individual operating engineers who have been referred to an employer by the union's hiring hall. As the District Court noted, "the duty to see that discrimination does not take place in the selection of one's workforce must . . . remain with the employer if it is to have full meaning." (PA. 194).

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3. The District Court Did Not Exceed Its Authority Under the All Writs Act by Binding Petitioners to the Terms of Its Injunctive Decree

In *United States v. New York Telephone Company,* 434 U.S. 159 (1977), this Court held that under appropriate circumstances a District Court could issue a writ binding "persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper ad-

ministration of justice." 434 U.S. at 174. The Third Circuit relied on *New York Telephone* in upholding in theory the imposition of an injunction on a nonculpable party.[32] *Pittsburgh-Des Moines Steel Co. v. United Steelworkers,* 633 F.2d 302 (3d Cir. 1980). The International's local representative had actively tried to prevent an illegal strike, and once it started, he tried to stop it. While ruling that the circumstances prevented the imposition of damages, the Court refused to hold that the International's lack of culpability rendered it immune from possible injunctive relief and was willing to allow an injunction if it would "be helpful in bringing about an end to the defaulting behavior [of the local union]. The basis for such relief against the third party is not culpability, but practical necessity." 633 F.2d at 307.

Similarly, the Seventh Circuit approved a District Court order adding the Chicago Civil Service Commission as a defendant in a suit where judgment had already been rendered. *DuShane v. Conlisk,* 583 F.2d 965 (7th Cir. 1978). The defendant Chicago Police Department had been unable to implement a prior court order that the Plaintiff be promoted since the Department could not promote employees absent action by the Civil Service Commission.

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[32] The injunction was overturned because the District Court had failed to make findings that its order binding the International was either necessary or helpful. 633 F.2d 302, 308. These findings were made in the instant case, "I have found it unquestionably necessary to require the imposition of certain quotas to govern entry into the union, referrals to actual jobs, and hours worked. There is simply no other way, given the circumstances of this case, to effectively remedy the discrimination found here. All of the parties, in their proposed injunctive decrees and responses to the proposals of other parties, have acknowledged as much since all have included some type of quota remedy." (PA. 223).

The Court, having previously determined that the Plaintiff was entitled to a promotion, held that its order would be frustrated unless the Civil Service Commission were bound by the decree, notwithstanding the Commission's lack of fault.

These cases demonstrate that the federal courts have the inherent authority to impose injunctive obligations on persons who are not liable for the wrongs the court is attempting to redress, if the obligations to be imposed are necessary for the court to succeed in its task.[33] As was pointed out in part III B(2), *supra*, it is necessary to bind the class members to the terms of the decree to ensure its successful implementation. Therefore, the District Court did not exceed its authority in so fashioning its decree.

IV. The Commonwealth of Pennsylvania Is a Proper Plaintiff

Petitioner GBCA contends that the Commonwealth of Pennsylvania lacks standing to bring this action.[34] While

[33] Several cases have also considered the burden imposed should the writ be allowed. *See e.g., United States v. New York Telephone, supra; In re Swearingen Aviation Corp.*, 486 F. Supp. 9 (D. Md. 1979). In the instant case, the greatest burden placed on the contractor class is the requirement that forms indicating the racial composition of their workforce be periodically filed with the court-appointed master. The initial burden of ensuring that minority referrals comply with the percentages established by the injunctive decree falls on Local 542.

[34] GBCA also contends that the District Court lacked jurisdiction over Pennsylvania's claim under 28 U.S.C. §§1343(3) and (4). That contention, however is superfluous. Even assuming *arguendo* that the District Court lacked jurisdiction under §§1343 (3) or (4), the District Court plainly has jurisdiction under 28 U.S.C. §1331.

the Court need not reach this issue since Petitioners do not challenge the standing of the individually named and class Respondents, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264, n. 9 (1977), it is indeed clear that the Commonwealth is a proper plaintiff in this proceeding.

This Court's prior decisions clearly establish that the presence of either of two sometimes overlapping governmental interests is sufficient to confer standing on a state. The first of these is an identifiable state proprietary interest;[35] the second is the capacity of the state as quasi-sovereign or *parens patriae* to vindicate the interests of its clients.[36]

The Commonwealth brought this action on its own behalf and as *parens patriae* of all its citizens. The interests of the Commonwealth implicated in this lawsuit are both proprietary and quasi-sovereign. The Commonwealth's proprietary interest is implicated because it funded the Benjamin Franklin programs.[37] Its quasi-sovereign interest is implicated because the defendants' conduct violates the Commonwealth's public policy against racial discrimination in employment.

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[35] An example of this was the harm Pennsylvania would suffer as a consumer of natural gas if its supply was threatened. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

[36] Originating in interstate pollution and water rights cases, *Missouri v. Illinois*, 180 U.S. 208 (1901), and *Kansas v. Colorado*, 206 U.S. 46 (1907), this determinant of standing is now viewed as encompassing the health, welfare and economic interests of a state's citizenry. *Commonwealth of Pennsylvania by Sheppard v. National Association of Flood Insurers*, 520 F.2d 11 (3d Cir. 1975).

[37] The fact that the Commonwealth sued in part to vindicate its proprietary interest disposes of GBCA's contention that Pennsylvania was acting as a "volunteer" on behalf of individual citizens.

A. The Commonwealth has a proprietary interest sufficient to support its standing.

A state's standing to sue in its proprietary capacity is determined by the same standards applied to private litigants.[38] The plaintiff must show that he has suffered actual or threatened injury as a result of the conduct of the defendant and that the injury is peculiar to himself or to the distinct group of which he is a part. *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99-100 (1979).

The Commonwealth suffered substantial injury as the result of defendants' discriminatory conduct. In 1968 and again in 1969, the Commonwealth was the major financial contributor to the Benjamin Franklin programs. In all, close to one million dollars was spent by the Commonwealth in an effort to provide increased employment opportunities for minorities in the operating engineers trade. The District Court found, and its finding is not challenged in these appeals, that the discriminatory acts of the defendants caused these programs to fail. For example, contrary to the agreements specifying the contents of the programs, minority graduates were not given preference in job referrals and were not given follow-up training. (PA. 37-40). As a result, minority graduates earned significantly less than their white counterparts.

The Commonwealth brought this action, in large part, to secure to minority graduates of the Benjamin Franklin programs the benefits and opportunities that were envisioned when the Commonwealth funded the programs and which would have been realized but for defendants'

[38] *See e.g., Florida v. Anderson,* 91 U.S. 667 (1875); *Alabama v. Tennessee Valley Authority,* 467 F. Supp. 791, 794 (N.D. Ala. 1979).

discrimination.[39] The Commonwealth's funding of the Benjamin Franklin programs is alone sufficient to support the Commonwealth's standing to maintain this action. *Cf., Village of Arlington Heights v. Metropolitan Housing Development Corporation, supra,* at 262-3 (allowing standing based not on economic injury but on an interest in the availability of low cost housing.)

B. The Commonwealth has a quasi-sovereign interest sufficient to support its standing as parens patriae.

In order to assert the right to sue as *parens patriae,* a state must be acting to protect a quasi-sovereign interest. *Georgia v. Pennsylvania Railroad Co.,* 324 U.S. 439 (1945). This Court has defined a quasi-sovereign interest as "an interest independent of and behind the titles of its citizens", *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907), and as "an interest apart from that of the individuals affected." *Pennsylvania v. West Virginia,* 262 U.S. 553, 592 (1923).[40] "Inherent in the concept of

[39] This aim has been accomplished through the remedial measures of the District Court's injunctive decree. *See* paragraphs 23, 24, 25, 41 (PA. 239-240, 247).

[40] Since the seminal case of *Louisiana v. Texas,* 176 U.S. 1 (1900), this Court has dealt on a number of occasions with what constitutes a sufficient quasi-sovereign interest for purposes of *parens patriae* standing. In *Missouri v. Illinois,* 180 U.S. 208 (1901), the Court permitted Missouri to bring an action to enjoin Illinois from discharging sewage into the Mississippi River. In *Kansas v. Colorado,* 206 U.S. 46 (1907), Kansas was permitted to sue as *parens patriae* to enjoin the diversion of water from an interstate stream. States were permitted to file suit as *parens patriae* to enjoin air and water pollution in *Georgia v. Tennessee Copper Co.,* 206 U.S. 230 (1907) (air) and *New York v. New Jersey,* 256 U.S. 296 (1921) (water). *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923), held that Pennsylvania could sue as

quasi-sovereign interests is protection of the public interest." *Kelley v. Carr*, 442 F. Supp. 346, 356 (W.D. Mich. 1977).

Pennsylvania brought the instant action to enforce its public policy against racial discrimination in employment.[41] This policy is reflected in the Pennsylvania Human Relations Act, 43 P.S. §951 *et seq.*, and, by virtue of the Supremacy Clause, in the federal civil rights laws which prohibit such discrimination.

Clearly, the Commonwealth has a quasi-sovereign interest in protecting and enhancing the welfare of its citizens by securing to them rights guaranteed by state and federal law. The discrimination which was the basis for the lawsuit permeates an industry whose confines are coextensive with the union to which hiring decisions were delegated. Local 542 counts upwards of 5,000 members and operates in 32 of Pennsylvania's 67 counties, including the Philadelphia metropolitan area. Defendants' actions have deprived a sizeable group of Commonwealth citizens of their right to seek employment as operating

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parens patriae to enjoin the enforcement of a West Virginia statute which would have disrupted the flow of natural gas to Pennsylvania. The decision in *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), permitted a *parens patriae* suit to enjoin antitrust violations damaging the state's economy. *See generally, Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 258 (1972).

[41] The action was filed by the Attorney General pursuant to his oath of office to uphold the Constitution of the United States and pursuant to Section 904 of the Pennsylvania Administrative Code of 1929, which authorized the Department of Justice "to take such steps, and adopt such means, as may be reasonably necessary to enforce the laws of the Commonwealth." 71 P.S. §294(b). This section has since been replaced by the Commonwealth Attorneys Act, Act 1980-164, which contains similar authority. *See* 71 P.S. §732-204(c).

engineers. They have also deprived all Commonwealth citizens of the opportunity to employ or be employed with minority operating engineers, thus infringing their right under §1981 to associate in their work with minorities.[42] Finally, defendants have deprived the citizens of the Commonwealth of the most basic right of our democracy, the assurance that laws enacted by our elected officials will be obeyed.

Racial discrimination has an invidious and corrosive effect throughout any society in which it exists. It is undeniable that discrimination is more than simply a problem faced by minority groups . Rather it is a problem of the entire society, one to which the state cannot remain indifferent. The harmful effects of discriminatory conduct extend not only to its immediate victims but to the mental attitudes of all the people of the Commonwealth. This is particularly true when as here the offending persons by virtue of their control over employment and their close involvement with Commonwealth activities have taken on the appearance of being clothed with state authority.[43] An appearance is created that the law counte-

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[42] *National Organization for Women v. Sperry Rand Corp.*, 457 F. Supp. 1338, 1346-7 (D. Conn. 1978); Comment, "Standing under 42 U.S.C. §§1981 and 1982: Direct, Indirect, and a New Loss of Association Standing," 13 Conn. L. Rev. 87 (Fall 1980); *cf., Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) (Civil Rights Act of 1968, 42 U.S.C. §3601 *et seq.*); *Fiedler v. Marumsco Christian School*, 631 F.2d 1144 (4th Cir. 1980) (associate with other students); *Valle v. Stengel*, 176 F.2d 697 (3d Cir. 1949) (associate in recreational activity). *See also, Lamb v. Sallee*, 417 F. Supp. 282 (E.D. Ky. 1976); *Williamson v. Hampton Management Co.*, 339 F. Supp. 1146 (N.D. Ill. 1972).

[43] As a major customer of the construction industry, the Commonwealth annually expends millions of dollars in contracts for the construction and repair of public buildings and highways.

nances the treatment of a segment of the community as second class citizens, when the law should reflect and enforce the most fundamental morals of the community. Such an appearance tends to reinforce discriminatory behavior on the part of some individuals while providing fuel for disrespect for the law on the part of others.

Injuries to the health and welfare of a state's citizens or to the general economy of the state have often been recognized as a sufficient basis for *parens patriae* standing.[44] Recent decisions have further expanded the category of injuries which support suits by a state in its capacity as parens patriae,[45] thus following "the recent trend toward liberalized standing." *Pennsylvania v. Kleppe,*

Commonwealth funds thus support the employment of thousands of operating engineers.

[44] *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945); *Com. of Pa. by Shapp v. Kleppe*, 533 F.2d 668, 671 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 977 (1976); *Burch v. Goodyear Tire & Rubber Co.*, 420 F. Supp. 82, 89 (D. Md. 1976), *aff'd* 554 F.2d 633 (4th Cir. 1977).

[45] *Washington Utilities & Transportation Comm'n. v. FCC*, 513 F.2d 1142, 1152-1153 (9th Cir. 1975), *cert. denied sub nom, National Association of Regulatory Utility Commissions v. FCC*, 423 U.S. 836 (1975) (state agency may assert *parens patriae* capacity of state in proceeding to challenge FCC order increasing intrastate telephone rates); *Alabama v. Tennessee Valley Authority*, 467 F. Supp. 791 (N.D. Ala. 1979) (state may sue federal agency as *parens patriae* based on loss of jobs and revenue resulting from agency's failure to locate its headquarters within state); *Missouri v. NOW*, 467 F. Supp. 289, 297-301 (W.D. Mo. 1979), *aff'd* without discussion of standing, 620 F.2d 1301 (8th Cir. 1980), *cert. denied*, 449 U.S. 842 (1980) (state may sue as *parens patriae* for economic injuries suffered as result of boycott of tourism industry); *Kelley v. Carr*, 442 F. Supp. 346 (W.D. Mich. 1977) (state attorney general may sue on basis of *parens patriae* doctrine and implied cause of action under Commodity Exchange Act in order to protect the public interest).

533 F.2d 668, 671 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 977 (1976).

Considerations of public policy mandate that states be permitted to bring *parens patriae* suits to enforce federal civil rights laws.[46] The constitutional genesis of §1981, *Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 433 (1968), and the concomitant national policy supporting as broad a scope for standing in civil rights cases as allowed under Article III of the United States Constitution, *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976), *cert. denied*, 429 U.S. 870 (1976); *Hackett v. McGuire Brothers, Inc.*, 445 F.2d 442, 446-7 (3d Cir. 1971), compel the conclusion that, since states have standing to bring *parens patriae* suits to enforce the federal antitrust statutes, *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), and other federal laws protecting interests less

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[46] GBCA's argument that Pennsylvania should have brought this action in state court is without merit. As the Third Circuit stated in *Pennsylvania v. Porter*, 659 F.2d 306, 319 (3d Cir. 1981):

> We do not know, and have no legitimate reasoning for inquiring why the Attorney General chose to bring an action for the vindication of federally protected rights in a federal forum. Congress has provided for federal question subject matter jurisdiction, and has not excluded the Commonwealth from resort to it. None of the familiar rhetoric of 'equity, comity and federalism', which is advanced so often in support of federal door closing devices when the state is resisting relief in favor of private plaintiffs, has any application to cases in which the state, acting through one of its highest executive officers, seeks the aid of a federal court in assisting it in the discharge of its freely acknowledged duty to enforce the provisions of the federal constitution. Closing the doors of a federal court upon the Commonwealth as a plaintiff would be a perversion of principles of federalism.

fundamental than civil rights, *Com. of Puerto Rico ex rel. Quires v. Bramkamp*, 654 F.2d 212 (2d Cir. 1981); *Com. of Puerto Rico v. Alfred L. Snapp and Sons*, 632 F.2d 365 (4th Cir. 1980), *cert. granted*, 50 U.S.L.W. 3436 (1981); *New York v. United States*, 65 F. Supp. 856, 872 (N.D. N.Y. 1946), *aff'd* 331 U.S. 284 (1947), they also have standing to enforce the civil rights laws.[47]

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[47] In *Georgia v. Pennsylvania Railroad Co.*, Justice Douglas discussed the harm suffered by Georgia as a result of price fixing.

> If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy. . . . Georgia as a representative of the public is complaining of a wrong, which if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate.

324 U.S. at 450-51. Much the same can be said when, as in this case, the state has alleged widespread racial discrimination.

Studies published by the federal government demonstrate that foreclosing job opportunities to minorities results in economic waste. *See e.g.*, Manpower Report of the President to Congress, xi-xvi, 110 (1964); Manpower Report of the President to Congress, xii (1968); U.S. Department of Labor, Report on Manpower Requirements, Resources, Utilization and Training to Congress, 39 (1969); U.S. Department of Labor, Report on Manpower Requirements, Resources, Utilization to Congress, 92, 95 (1970). *See also*, House Judiciary Committee Report on the Civil Rights Act of 1964, 88th Congress, 2d Session, 282 (1964).

A recent study of the Congressional Research Service, Library of Congress, estimated the impact on the GNP of racial discrimination in employment to be $93.5 billion in 1978. Hearing before the Joint Economic Committee on the Cost of Racial Discrimination, 96th Congress, 1st Session (October 19, 1979).

At least one circuit and numerous district courts have held that states have *parens patriae* standing to enforce federal civil rights laws. *See e.g., Commonwealth of Pennsylvania v. Porter*, 659 F.2d 306 (3d Cir. 1981) (en banc); *Commonwealth of Pa. v. Flaherty*, 404 F. Supp. 1022 (W.D. Pa. 1975); *Commonwealth of Pa. v. Glickman*, 370 F. Supp. 724 (W.D. Pa. 1974); *Commonwealth of Pa. v. Brown*, 260 F. Supp. 323 (E.D. Pa. 1966), *vacated and remanded on other grounds*, 373 F.2d 771 (3d Cir. 1967) (en banc), *on remand*, 270 F. Supp. 782 (E.D. Pa. 1967), *affirmed*, 393 F.2d 120 (3d Cir.) (en banc), *cert. denied*, 391 U.S. 921 (1968). As stated by Judge Gibbons in *Pennsylvania v. Porter, supra* at 315, "[b]y virtue of the supremacy clause, the Commonwealth has the same interest in compliance with the standard of conduct laid down in the Fourteenth Amendment as it has in standards of conduct enacted by the Pennsylvania legislature." His reasoning applies equally to this action brought to enforce federal as well as state statutes prohibiting racial discrimination in employment.

Clearly, the Commonwealth's interest in securing to its citizens equal employment opportunity and the elimination of invidious and systematic racial discrimination in a major industry supports its standing as *parens patriae*.

CONCLUSION

For the reasons stated above, the Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,
LEROY S. ZIMMERMAN
Attorney General

By: JOEL M. RESSLER
LOUIS J. ROVELLI
MARGARET HUNTING
Deputy Attorneys General
Counsel for Respondent,
Commonwealth of Pennsylvania

Office of Attorney General
1545 Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 787-5050

Respondent's Brief

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Nos. 81-280, 81-330, 81-331, 81-332 and 81-333

IN THE

Supreme Court of the United States

October Term, 1981

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.; UNITED ENGINEERS AND CONSTRUCTORS, INC.; THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA; THE UNITED CONTRACTORS ASSOCIATION; GLASGOW, INC.; and BECHTEL POWER CORPORATION,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, et al.,

Respondents

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR INDIVIDUAL AND CLASS RESPONDENTS

ROBERT J. REINSTEIN
Klein Hall
1719 North Broad Street
Philadelphia, Pennsylvania
19122

HAROLD I. GOODMAN*
GERMAINE INGRAM
JONATHAN M. STEIN
Community Legal Services, Inc.
Sylvania House
Juniper and Locust Streets
Philadelphia, Pennsylvania
19107
(215) 893-5354
Counsel for Individual and Class Respondents

*Counsel of Record

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTIONS PRESENTED

1. Does 42 U. S. C. § 1981 exempt employers and trade associations from liability for the intentional racial discrimination of a hiring hall which they jointly established and exclusively relied upon to supply the employers with workers?

2. Did the District Court have the power to include the employers and trade associations in its injunctive decree in light of its conclusion that they were necessary to ensure that minorities were not subject to further racial discrimination?

3. Did the District Court correctly certify a defendant class of employers who signed labor contracts creating and perpetuating a racially discriminatory hiring hall on which all the employers in the industry exclusively relied for their workers?

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STATEMENT

A. The District Court's Findings of Fact

This is a case of intentional racial discrimination arising out of the operation of an exclusive labor-management hiring hall and apprenticeship program. The hiring hall was established in 1961 when several contractor associations, including two petitioners here,[1] executed a collective bargaining agreement with Local 542 of the International Union of Operating Engineers ("Local 542" or "the Union") (PA. 23).[2] That agreement delegated two traditional management functions to Local 542: the admission of new workers into the operating engineers craft and the referral of admitted workers to jobs with the employers covered by the Union's jurisdiction (PA. 24-26).[3]

The exclusive hiring hall has remained in effect for the last twenty years. Under the labor contracts which created it, all Local 542 employers—there have been as many as 1488—are required to rely exclusively on the hiring hall for operating engineers.[4] No employer is permitted to accept direct applications or hire operators on its own. Similarly,

1. General Building Contractors Association, Inc. ("GBCA") and Contractors Association of Eastern Pennsylvania ("CAEP").

2. The references to "PA." are to the Appendix accompanying the Petitions for Certiorari in Nos. 81-330 through 81-333. Subsequent references to "JA." are to the Joint Appendix filed with petitioners' Briefs.

3. The Union's jurisdiction covers eastern Pennsylvania and the State of Delaware. Because of its size, Local 542 is divided into five districts. But there is only one exclusive hiring hall system, and it operates the same way in each district (PA. 23-26, 141).

4. Operating engineers are engaged in building and highway construction work. They operate equipment such as bulldozers, forklifts, graders, rollers, backhoes, cranes and the like. The technological development of the craft, as well as an overview of racial discrimination by local operating engineers unions, is analyzed in G. Mangum, THE OPERATING ENGINEERS (1964); *see especially id.* at 233.

no person affiliated with Local 542 is permitted to directly apply for work with any employer subject to a Union contract; instead, each must rely on the Union for referrals (*id.*).

The apprenticeship program, referred to by its acronym JATC,[5] was established in 1965 by the contractor associations and Local 542. It is administered by six labor-management trustees, three of whom are selected by the associations and three by Local 542. The program lasts four years, and involves classroom and field training. Once indentured, apprentices become members of Local 542. While in the JATC, apprentices are referred to oiler and maintenance jobs by Local 542. Graduates of the program become journeymen operating engineers and are referred to heavy equipment jobs by the Union (PA. 121-122).

Having been granted complete control over new admissions and referrals, the Union and the JATC then proceeded to engage in a pattern and practice of discrimination against minorities.[6] The nature of that dis-

5. "JATC" stands for the Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania and the State of Delaware.

6. The intentional discrimination which Local 542 and the JATC practiced against minorities is not atypical. Just two Terms ago the Court concluded that racial discrimination in the construction trades was so pervasive and entrenched that it was a proper subject for judicial notice. *United Steelworkers of America v. Weber,* 443 U. S. 193, 198 n. 1 (1979). The magnitude of that discrimination has been extensively documented by commentators and the courts. *See, e.g.,* H. Hill, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM, 235-247 (1977); United States Commission on Civil Rights, THE CHALLENGE AHEAD: EQUAL OPPORTUNITY IN REFERRAL UNIONS, 58-94 (1976); R. Marshall and V. Briggs, THE NEGRO AND APPRENTICESHIP, 83-97 (1967); G. Myrdal, AN AMERICAN DILEMMA, 1079-1124 (1944); W. E. B. DuBois, THE PHILADELPHIA NEGRO, 26-31 (1971 ed.). Among the many reported decisions finding racial discrimination in the building trades, *see, e.g., Hameed v. International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 396,* 637 F. 2d 506 (8th Cir. 1980); *Local 35,*

crimination, which covered the periods both preceding and following the filing of the complaint, is comprehensively analyzed in the District Court's liability opinion (PA. 23-132). Summarized generally, Local 542 and the JATC intentionally denied hundreds of minorities the right to enter the craft and to obtain employment with *any* employer (PA. 51-57, 67-94, 121-127). Local 542 also intentionally discriminated against the few minorities who were able to become affiliated with it and the JATC by denying them referrals to the employers on the same basis as whites (PA. 60-66). The impact of entry and referral discrimination was revealed in the employers' collective workforce: hardly any minorities were employed by them as operating engineers (PA. 65-66).[7] Not one of the petitioners challenges the findings below that minorities were intentionally denied entry into the operating engineers craft and jobs with the employers as a result of the class-wide discrimination practiced by Local 542 and the JATC.

The District Court also made express and comprehensive findings of fact on the associations' and employers' joint participation in constructing, operating and preserving the racially discriminatory hiring hall system. None of these findings was challenged as clearly erroneous in the Court of Appeals, and none has been so challenged here. Those findings are critical to the associations' and em-

6. (Cont'd.)

International Brotherhood of Electrical Workers v. City of Hartford, 625 F. 2d 416 (2d Cir.), *cert. denied*, 101 S. Ct. 3148 (1981); *United States v. Masonry Contractors Association of Memphis, Inc.*, 497 F. 2d 871 (6th Cir. 1974); *Associated General Contractors of Massachusetts v. Altshuler*, 490 F. 2d 9 (1st Cir. 1973), *cert. denied*, 416 U. S. 957 (1974); *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F. 2d 159 (3d Cir.), *cert. denied*, 404 U. S. 854 (1971).

7. In this respect particularly, the evidence showed ". . . the pervasive effect that a hiring hall agreement has on the employment relationship." C. Morris, THE DEVELOPING LABOR LAW, 714 (1971).

ployers' liability in this case; and, particularly since they are not addressed in any of petitioners' briefs, we recount them here with some specificity before addressing the District Court's legal conclusions.

1. The Associations' and Employers' Role in Creating and Maintaining the Exclusive Hiring Hall With Local 542

Historically, the employers that recognized Local 542 as a bargaining agent exercised their traditional management prerogative of hiring whomever they wanted as operating engineers. This hiring was done by each employer's personnel office, foremen or other persons designated by management. In 1961, however, Local 542 demanded an exclusive hiring hall arrangement in which it would be the sole hiring agent for the employers. At first, the trade associations representing the employers resisted the Union's demand. But, after a ten-week strike, the associations relented and signed a collective bargaining agreement that made Local 542 the industry's exclusive hiring agent (PA. 23). Every contract negotiated since 1961 has preserved the fundamental decision reached that year that the hiring hall established with Local 542 would determine who could work for the employers (PA. 24-26).[8]

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8. The record shows that when the 1961 contract expired in 1963, the associations attempted to eliminate the exclusive hiring hall arrangement but, following a strike, acquiesced again (JA. 310). *There is no evidence in the record of any strike or threatened strike after 1963.* During the 1963 negotiations, the Union also reported that the associations accused it of racial discrimination; the Union's response was to put a black member on the Union's negotiating team (JA. 139).

The contract has always prohibited discrimination against non-union members (PA. 26); but in 1971, for the first time, a prohibition of racial discrimination was added (*id.*, n. 6). There have been no other significant changes in the hiring hall provisions of the contract since 1961 (PA. 24, n. 4; JA. 225-262).

Although only about 20 percent of all employers who hire through Local 542 are members of the named defendant associations, the contract which the associations negotiate is the norm for the entire industry (PA. 29-30, JA. 325). Until 1971, CAEP and GBCA negotiated with Local 542; the resulting contract was then signed by all non-association employers. In 1971, the associations formed a master association to negotiate with Local 542; again, the resulting contract was signed by all non-association employers (JA. 320). Thus, there is "a uniform hiring hall system" operated according to one set of rules, the function of which is to refer a common pool of applicants for employment to the entire class of employers (PA. 141; *see also* PA. 195, 205-206).

The employers derived substantial benefits from the hiring hall.[9] It provided them with a central pool of skilled workers who were constantly available on twenty-four hour telephone notice. It thereby eliminated the need, and attendant costs, for advertising, recruiting, screening and hiring operating engineers on their own. It also eliminated delays in construction that otherwise would have occurred in the absence of an organized pool of available workers.

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9. *See generally Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U. S. 667, 672-4 (1961). Exclusive hiring hall contracts in the building and construction industry are permitted, but not required, by Section 8(f) of the Landrum-Griffin Act, 29 U. S. C. § 158(f). Their use has been advocated because they provide a readily available, central labor pool for employers and employees alike. *See* 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT AND DISCLOSURE ACT OF 1959, at 424 (1959). Hiring halls were not, however, simply an outgrowth of the Landrum-Griffin Act. They existed before the Taft-Hartley Act made closed shops illegal in 1947, 29 U. S. C. § 158(b)(2), and they also flourished in the 1947-1959 period despite considerable doubts about their legality. *See, e.g.*, R. Bastress, Application of a Constitutionally Based Duty of Fair Representation to Union Hiring Halls, 82 W. Va. L. Rev. 31, 45-52 (1979); United States Department of Labor, EXCLUSIVE WORK REFERRAL SYSTEMS IN THE BUILDING TRADES, 1-21 (1970).

2. The Associations' and Employers' Role in Creating and Maintaining the JATC With Local 542

The JATC was primarily established to train unskilled workers for jobs with the employers. The program therefore eliminated the need for formal training and upgrading programs by the employers (PA. 14-15). Local 542 and the employers, acting through the associations, have equal authority for the operation of the JATC (PA. 121). The six trustees are responsible for the admission of all apprentices, and they also oversee the daily operation of the program. The JATC is financed entirely by mandatory contributions from every employer.[10]

Petitioners do not dispute the District Court's holding that the JATC engaged in intentional racial discrimination against minorities. Nor do they dispute the finding that the JATC, with its unvalidated strict entry requirements, was used as a barrier for unskilled minorities, while Local 542 admitted scores of unskilled whites into the craft where they obtained skills as heavy equipment operators through informal on-the-job training with the employers (PA. 67-72, JA. 279). Finally, petitioners do not challenge the finding that intentional racial discrimination was practiced against the few minorities who did enter the JATC. They were discriminatorily denied referrals, jobs and wages, and frequently were suspended from the program (PA. 61-64, 125). Only a handful of minorities ever graduated the JATC (PA. 121).

3. The Exclusion of Minorities from Employment Opportunities With the Employers

The Distrirt Court found that minorities accounted for between 11.5 and 13.9% of the available labor force for operating engineers (PA. 52-53, 99 n. 31). But minorities worked less than 4% of all operating engineers hours reported by the employers (PA. 57). During the three-year period preceding the filing of the complaint, 70% of the

10. *See, e.g.*, Article VII, § 3 of the 1971-1973 collective bargaining agreement (Pl. Ex. 215, p. 37; Tr. 481).

1,488 employers reporting hours employed no minorities at all, and there were only 23 employers who reported that minorities worked over 10% of their total operating engineers hours (PA. 65-66).

To put these figures in even more concrete terms, operating engineers worked approximately 9.7 million hours per year for the employers during each of the three years preceding the filing of the complaint.[11] If minorities had been employed in rough approximation to their availability in the labor force, they would have worked an average of between 1.12 million and 1.35 million hours per year.[12] Instead, they worked only an average of about 350,000 hours per year,[13] nearly one million hours of work lost due to intentional racial discrimination.

4. The Associations' and Employers' Power to Oppose Discrimination by Local 542

Petitioners claim that, having delegated their own management prerogatives to the hiring hall, they relinquished all power over the hiring hall's operations. The District Court, however, made explicit findings of fact to the contrary (PA. 29-30, 192). The court found that the employers retained the right to reject persons referred from the hiring hall (PA. 26). They also retained the right to enforce the contract's terms in the event that they were violated by the persons operating the hiring hall. Indeed, the court

11. The total hours worked for 1969-1971 were as follows: 10,114,764 in 1969; 10,264,470 in 1970; and 8,798,138 in 1971. These figures are presented in the main report of the Union's expert witness (Union Ex. 428, Table 10; Tr. 11,442). *See also* JA. 197.

12. *I.e.*, multiplying the total hours in note 11 by 11.5-13.9% (the minority labor force percentage) yields 1.16-1.41 million hours in 1969, 1.18-1.43 million in 1970 and 1.01-1.22 million hours in 1971.

13. *I.e.*, multiplying the total hours in note 11 by the percentage of hours actually worked by minorities (3.58% in 1969, 3.70% in 1970 and 3.62% in 1971 (Pa. 57)) yields 362,108 minority hours in 1969, 379,785 hours in 1970 and 318,493 minority hours in 1971.

pointed to a provision of the contract which authorized an appellate grievance tribunal to overrule the hiring hall when it violated the contract rules (PA. 29-30, JA. 246, 259). Finally, although it was not added to the contract until 1971, the associations and employers had the right to enforce the provision in the contract which prohibited racial discrimination in the operation of the hiring hall (PA. 192 and n. 61).

The District Court found that the extent of the discrimination was "a matter of such broad scope that some or all contractors and associations might have had knowledge of it." (PA. 168). But, because liability was pursued on a classwide basis, the court found that not all the employers and associations, viewed simply as a class, were actually aware of the Union's discrimination (*id.*). It did find, though, that the employers, particularly through the associations, had the "collective capacity" to be aware of racial discrimination by the hiring hall, and to correct abuses where found (PA. 192). But no employer or association took *any* steps to resist discrimination by Local 542 (PA. 185, n. 58). The District Court explicitly found: "The evidence reveals they did nothing whatsoever." (PA. 192).

5. The Associations' and Employers' Role In Nullifying the Philadelphia Plan

Although the employers and associations did nothing to oppose their hiring agent's racial discrimination, the District Court found that they took decisive steps in the late 1960's that ensured a continuation of that discrimination.

Shortly after Executive Order 11246 became effective, the United States Department of Labor, acting through the Office of Federal Contract Compliance ("OFCC"), sent representatives to advise contractors, contractor associations and craft unions of their individual responsibilities to comply with the Order.[14] Bennett Stalvey, OFCC's Phila-

14. President Lyndon Johnson issued Executive Order 11246 on September 24, 1965 (30 Fed. Reg. 12,319). The Order prohibits

delphia regional director, met with officials of Local 542, CAEP and GBCA in late 1966 (PA. 31). He advised them of their respective responsibilities, and stressed that those responsibilities superseded their exclusive hiring hall agreement to the extent that the agreement interfered with implementation of the Executive Order (PA. 31-32, JA. 282-287). He also provided the associations with two lists which identified a number of community organizations that were willing to act as minority recruitment sources for the contractors (JA. 190-191, 303-304).

Despite the requirements of the Executive Order, and despite the minority recruitment sources available to CAEP and GBCA, the associations and contractors refused to comply with the overriding requirements of federal law (PA. 31-32, JA. 304, 315). Instead, they continued to rely exclusively on Local 542 for operating engineers.

In the fall of 1967, the Department of Labor developed the Philadelphia Plan as a specific means of implementing Executive Order 11246. The Plan was designed to ensure minorities with a non-discriminatory share of the construction work generated by federal contracts (PA. 31, JA. 288-289). The operating engineers was one of eight construction crafts included in the Plan (JA. 289).

The associations, acting for the employers, resisted the Philadelphia Plan (Pa. 31-32). Moreover, the employers refused to commit themselves to meet the Plan's goals (*id.*). As a result, the federal government began withholding highway construction funds in eastern Pennsylvania (PA. 32). By the summer of 1968, more than $30 million had been withheld (*id.*).

In order to break the impasse created by the withholding of these funds—a decision which severely curtailed operating engineers work in eastern Pennsylvania—Local

14. (Cont'd.)

discrimination in employment, and requires affirmative action on the part of companies having contracts with the federal government in excess of $10,000.00.

542, CAEP, GBCA and two other contractor associations [15] signed an Affirmative Action Program ("AAP") in the summer of 1968 as a means of satisfying their obligations under the Executive Order (PA. 32, JA. 144-149, 160-161).

The purported intent of the AAP was to attract minorities into the operating engineers craft and to provide an upgrading program for minorities already affiliated with Local 542 (PA. 33). In that respect, it completely failed (PA. 37-39, 40 n. 15). As the District Court found, its true purpose, and the one actually achieved, was to create an industry-wide exemption for the operating engineers craft from the coverage of the Philadelphia Plan (PA. 33, JA. 150-159).[16] Once approved by the Department of Labor, the AAP had two other distinct consequences: first, it caused the release of all the construction funds that had been withheld as a result of the employers' resistance to the Philadelphia Plan; second, it preserved, without modification, the exclusive hiring hall system established in the parties' collective bargaining agreement (PA. 33).

The federal government would not have approved the Affirmative Action Program except for a representation concerning minority membership in Local 542 which appeared on the first page of the document. The parties claimed that they had performed a "detailed analysis" of the Union's membership, and that they had found there were 650 minorities out of 5,400 members in Local 542 (PA. 32-33). That was a gross exaggeration. Were it true, it would have meant that minorities comprised 12% of Local 542's membership—virtually identical to their percentage in the labor force.

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15. United Contractors Association ("UCA", a petitioner here) and Pennsylvania Excavating Contractors Association (a named defendant below, but which dissolved in 1972—PA. 29).

16. The associations obtained this exemption not only for their own members but for all other employers as well (JA. 148, 154-155, 164-165, 173). It was at the insistence of the associations that the AAP exempted the operating engineers from the Philadelphia Plan (PA. 32).

But minorities actually constituted less than 4% of all operating engineers in Local 542 (PA. 33-36). Were it not for the misrepresentation, the operating engineers would have been covered by the Philadelphia Plan. And, found the District Court, "[t]he Philadelphia Plan would have resulted in a higher number of minority group members in the union and in the related industry." (PA. 36; *see also* JA. 156). Although the associations may not have had actual knowledge of the formal error in the figures (PA. 198), the District Court found that they were "willing parties to the scheme" to nullify the Plan (PA. 37), and that they had shown "reckless disregard for equal employment opportunity for minorities." (PA. 128).

6. The Associations' and Employers' Role in Violating the Commitments of the Affirmative Action Program

The Affirmative Action Program signed by the four associations and Local 542 contained three specific commitments. The District Court found that each was breached:

(a) The AAP required the parties to file semi-annual reports to OFCC containing information on where and in what capacity minorities were employed. This information was never provided (PA. 35).

(b) The AAP required a training program to upgrade the skills of minorities affiliated with Local 542 (JA. 147). Though a training program was held in 1969, and received federal funding, it did not provide training opportunities for minorities; "even at this basic level" the AAP was violated (PA. 40 n. 15).

(c) The AAP required the associations and the Union to devise a plan for attracting unskilled minorities into the industry (JA. 145-147). Two training programs were conducted in 1969 and 1970 purportedly to meet this objective (JA. 168, 185-189). Both were funded by the United States Department of Labor and the Pennsylvania Department of Community Affairs. The second was also funded

by Pennsylvania highway contractors, who created a corporation, Construction Training, Inc., for that purpose (PA. 39). Funding for both programs exceeded $1,250,000. While the promises of the parties were lofty, the result was that the minority trainees were discriminated against in jobs, hours worked and wages (PA. 37-40).

B. The District Court's Conclusions of Law

The District Court held that Local 542 and the JATC violated 42 U. S. C. § 1981 by practicing systematic and intentional racial discrimination against minorities.[17] It also held that the associations and employers violated § 1981 since, by relying on Local 542 and the JATC, they denied minorities "the same right" to work as operating engineers as was "enjoyed by white[s]." (PA. 167-196).[18]

In reaching the latter conclusion, the District Court principally relied on the explicit language of § 1981 and the non-delegable duty not to discriminate that the statute creates (PA. 194-195). It held that "[t]he duty to see that discrimination does not take place in the selection of one's workforce must . . . remain with the employer if it is to have full meaning." (PA. 194). That duty applies regardless of whether an employer relies on its own foreman or personnel office or, as here, on an exclusive hiring hall. "It is still the employer who contracts to hire individuals, even in a hiring hall setting. . . ." (*Id.*). Thus, the employers and associations were held injunctively liable for the loss of employment opportunities suffered by minorities (PA. 194-196).

The District Court also rejected the argument that each employer's workforce must be examined individually before a judgment could be rendered against the defendant

17. The Court also held that the Union and the JATC violated Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* (PA. 159-164, 167 n. 52).

18. The complaint did not assert that the associations and employers had violated Title VII since they were not named as respondents in the *pro se* charge filed by the plaintiffs with the EEOC.

class (PA. 195). In this respect, it adhered to its pre-trial order bifurcating the case into, first, a classwide liability phase, and then, a separate damage phase (JA. 132-133). As a result, the court carefully avoided making any individualized determinations at Stage I (PA. 93-94, 132, 196). But the court ruled that, at least for injunctive purposes, the employers as a class were collectively responsible for the discrimination inflicted on plaintiffs. Hundreds of minorities had been excluded altogether from the industry as part of the hiring hall's and JATC's intentional discrimination; these minorities could not work for *any* employer. Thus, although a minuscule number of employers were referred minorities in reasonable numbers, even those employers could not disclaim responsibility for the exclusion of other minorities from any work with them (PA. 195).

The District Court also reaffirmed its pre-trial certification of the defendant class, with a modification to reflect the applicable statute of limitations (PA. 198-212, JA. 334).[19] Finally, the District Court emphasized that its holding of defendant class liability applied to injunctive relief only. The court deferred the question of whether the defendant class certification would apply to future back pay proceedings and stated that its holding of defendant class liability did not carry a presumption of back pay liability against the employers because back pay might be

19. The pre-trial certification issued on March 13, 1972 (JA. 118-119) created two subclasses of defendants: a class of contractor associations which executed collective bargaining agreements with Local 542, and a class of employers which were parties to collective bargaining agreements with the Union (*id.*). Notice of the defendant class certification and a description of the suit was sent by certified mail to each class member in December, 1973 and January, 1974 (PA. 212, JA. 121-123).

The post-trial certification amended to reflect Pennsylvania's six-year statute of limitations for contract actions, included all contractor associations and employers who were parties to a collective bargaining agreement with Local 542 at any time from November 8, 1965 to the date the liability opinion was released (JA. 334).

allocated according to the relative faults of the defendants (PA. 18, 196).

C. The District Court's Judgment and Decree

The District Court's injunctive order, styled a Judgment and Decree, enjoins Local 542 and the JATC from future discrimination and imposes affirmative remedial obligations in the areas of membership, affiliation and referrals (PA. 228-252). The District Court found, however, that complete relief would be impossible without the inclusion and participation of the employers and associations (PA. 205-206, 223). It therefore imposed separate remedial requirements on them, the most important of which are the following:

1. The creation of minority-hours goals on the employers to ensure that minorities receive a non-discriminatory share of operating engineers work over the five-year life of the injunction (PA. 234-235). These goals are gradually phased in "so as to avoid undue disruption to employers and non-minority operating engineers." (PA. 225).

2. The requirement that employers must hire minorities unaffiliated with Local 542 if the hiring hall does not refer them sufficient numbers of minorities to meet their hours goals (PA. 241-242).

3. The requirement that a retraining and upgrading program be conducted to remedy the denial of training opportunities that minorities suffered as a result of discrimination in referrals, hours worked and wages (PA. 247). The program is to include on-the-job training as well as training at the various JATC training sites (*id.*).

4. The reformation of the parties' collective bargaining agreements to ensure compliance with the overriding requirements of the Judgment and Decree (PA. 250). Each member of the defendant class was therefore required to obey the Decree, any conflicting provisions in the labor contract notwithstanding.

D. Post Decree Orders

A number of orders have been entered by the District Court to implement the Decree.[20] Those which are relevant here include:

1. Post Decree Order #10 held that all defendants must bear a share of the costs of implementing the Decree (PA. 282-286). Costs were allocated as follows: 40% to the Union; 25% to the JATC; 10% to each of the three associations;[21] and 5% to Glasgow. The associations and Glasgow were given a right of contribution against the members of the defendant class. *See* 507 F. Supp. 1146, 1158-9 (E. D. Pa. 1980) (allocation of injunction-related costs).[22]

2. Paragraph 12 of the Judgment and Decree imposed minority utilization goals on *each* employer. Post Decree Order #15 modified this provision of the Decree by requiring that only 50% of the employers in each district must meet the goals (PA. 308-310).

3. Post Decree Order #35, entered on April 6, 1981, decertified the defendant class for purposes of monetary liability.[23]

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20. Shortly after the trial concluded, the Honorable A. Leon Higginbotham, who had supervised the case from the beginning, was elevated to the Court of Appeals for the Third Circuit. He continued to sit by designation through the entry of the Decree. The case was then assigned to the Honorable Louis C. Bechtle, who issued the orders discussed in this section. Judge Bechtle also ordered, consistent with ¶ 46 of the Decree (PA. 250), that notice of the Decree and the Decree itself be transmitted to each member of the plaintiff and defendant classes. That was done by certified mail in August, 1981 (PA. 347).

21. Defendant Pennsylvania Excavating Contractors Association had dissolved before the liability opinion was issued.

22. Reprinted in the Appendix accompanying the Petition for Certiorari in No. 81-280, at 194-225.

23. A copy of Post Decree Order #35 is bound herewith as Addendum A.

E. The Court of Appeals' Judgment

Appeals were filed by each of the named defendants and by two employers who are members of the defendant class (Bechtel Power Corporation and United Engineers & Constructors, Inc.). Those appeals were heard by six judges of the Court of Appeals, sitting *en banc*.[24] The Court of Appeals unanimously affirmed the judgment and orders against Local 542 and the JATC (JA. 429-431). The judgment and orders against the employers and association appellants were affirmed by an equally-divided court (JA. 425-428).

F. Implementation of the Judgment and Decree

The Decree took effect on September 1, 1980 and has now been in operation for slightly more than one year. The court-appointed Master has recently filed a report on the first year's operation of the Decree. He reported that the employers collectively exceeded the first year minority utilization goals in each of the Union's five districts. The number of minorities affiliated with the Union has increased substantially, and the percentage of hours worked by minorities has more than doubled.[25]

SUMMARY OF ARGUMENT

I.

At the heart of the liability issue in this case lies the pivotal question of precisely what responsibility an employer or association has under 42 U. S. C. § 1981 when it jointly creates and relies exclusively on a hiring hall for its workers. The answer to this question is found in the unequivocal language of the statute. Regardless of what hiring agent is utilized, the employer has a duty to afford

24. Three active judges of the Court of Appeals (Judges Adams, Higginbotham and Sloviter) did not participate.

25. A copy of the Master's report, filed with the District Court on October 20, 1981, is bound herewith as Addendum B.

minorities the "same right" to enter into employment contracts with it "as is enjoyed by white[s]." The duty that § 1981 imposes on employers is absolute: no special exemption is created for employers who use hiring halls.

In this case, the employers and associations violated § 1981 because they did not afford minorities the same right as whites to work for them as operating engineers. Solely on account of intentional racial discrimination, hundreds of minorities were precluded from the industry entirely and could not make employment contracts as operating engineers with *any* employer. Similarly, the relatively small number of minorities who obtained access to the industry could not get jobs with the employers on the same basis as whites.

That the intentional racial discrimination against minority operating engineers was practiced by entities which the employers and associations jointly established (the hiring hall and JATC), rather than by the employers or associations themselves, is immaterial. The doctrine of vicarious liability is part and parcel of § 1981. That doctrine was deeply embedded in the common law when § 1981 was enacted. There is nothing in the language or legislative history of § 1981 to suggest that the 39th Congress intended to repudiate vicarious liability when it enacted the statute.

Whether the employers had a right of control over the hiring hall, as they would have had over their foremen, is irrelevant. Regardless of whether that right to control existed, the employers and associations had a non-delegable duty not to discriminate in employment against minorities. The plain language and central purpose of § 1981 places that non-delegable duty upon them. As is true of other laws guaranteeing racial equality or employment rights, "[the statute] is directed primarily against the employer, and only secondarily against others as they may aid and abet him. He must neither create nor suffer in his business the prohibited conditions. The command is addressed to

him. . . . He must then stand or fall with those whom he selects to act for him. . . . [T]he duty must be held personal, or we nullify the statute." Cardozo, J., in *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N.Y. 25, 29, 121 N. E. 474, 476 (1918). The rights guaranteed by § 1981, and the duty the statute imposes on employers, cannot be delegated away to anyone. Thus, the District Court correctly held that "[e]mployers cannot be permitted to use the union [or any other hiring agent] as a shield and become oblivious to discriminatory practices whose true harm is revealed in the composition of their own employees." (PA. 194).

Even assuming that non-delegable duties are not imposed by § 1981, the District Court properly concluded that under conventional tests of agency the hiring hall was the agent of two principals—the Union and the employers, with their associations—in a joint venture providing substantial benefits to both (PA. 191). This conclusion was based on explicit findings of fact, the most important being that the employers and associations jointly created the hiring hall and retained the power to monitor its operations. Moreover, they retained the power to challenge the Union's discriminatory practices. But, the court found, they did nothing to challenge Local 542's discrimination; on the contrary, they became "willing parties" (PA. 37) to the Union's scheme to resist governmental efforts to secure equal employment opportunity. These findings are supported by the record and provide an alternative ground, based on a theory of joint venture, for holding the employers and associations liable.

Because the employers collectively delegated their entry and referral authority to Local 542, all employers are liable regardless of their individual minority workforce statistics. By being discriminatorily denied registration with the hiring hall, minorities were unlawfully precluded from working for *any* employer. Although the hiring hall did refer some minorities, the small fraction of em-

ployers to which they were referred are also liable because their hiring agent precluded many more minorities from any chance of working for them or anyone else. A racially balanced workforce is not a defense to acts of intentional racial discrimination.

II.

The imposition of liability and injunctive relief on the employers and associations comports with the intent and policy underlying § 1981. That statute expresses this Nation's commitment to eradicate racial discrimination in employment as a priority of the highest magnitude. If an employer can evade its duty under Section 1981 simply by the type of hiring agent it creates and utilizes, the statute will be nullified. That nullification will be especially harmful in the construction industry where racial discrimination has been pervasive and entrenched. More particularly, in this case the District Court found that the massive discrimination inflicted on scores of minorities could not be remedied by any decree that failed to include the employers and associations. It therefore set minority-hours goals on the employers, required them to hire minorities unaffiliated with Local 542 if that was necessary to achieve those goals, and ordered them to establish training and upgrading programs to remedy past discrimination. Finally, the District Court reformed the parties' labor contract to conform it to the terms and provisions of its injunctive Decree.

There is nothing unfair or inequitable about subjecting the employers and associations to injunctive relief. They made a calculated business decision to create and use the hiring hall as the exclusive source of employees, and they are responsible for the consequences of that decision. Moreover, the court's Decree subjects them to the obligations they would have been under since 1968 had they not willingly joined the Union's scheme to annul the Philadelphia Plan. It is difficult to imagine a stronger case of restorative justice.

III.

The defendant class was correctly certified. The claims against each employer involve identical questions of fact and law: whether the Union practiced intentional discrimination, and whether that discrimination can be imputed to each member of the defendant class. Glasgow, the named defendant employer, was an adequate representative because, by defending against its own liability, it defended against the liability of each employer member of the class it represented. No individualized defense to injunctive liability is available when *all* employers create and use one hiring hall system through which industry-wide intentional race discrimination is practiced.

Certification was appropriate under Rule 23(b)(2). That provision of Rule 23 contemplates defendant as well as plaintiff class actions in homogeneous civil rights cases. The precise requirements of (b)(2) are satisfied here because, as a result of the exclusive hiring hall arrangement, each plaintiff ("the party opposing the [defendant] class") acted—indeed, was forced to act—in the same way with respect to each employer class member. Corresponding final injunctive relief "with respect to the class as a whole" was appropriate and necessary.

Neither Rule 23 nor due process requires service of a complaint and summons on each member of the defendant class. Rather, personal jurisdiction over absent class members is achieved when the named defendant is served and is an adequate representative of the class. A requirement that each member of the defendant class be separately served would defeat the chief advantage of the class device, *viz.*, avoidance of a multiplicity of lawsuits. Requiring separate actions against 1488 employers, or naming 1488 employers in a single complaint, would have been unmanageable and financially prohibitive. Moreover, although notice is not required in (b)(2) class actions, each member of the defendant class was sent notice in this case. Under the circumstances, there was no prejudice to absent class employers.

ARGUMENT

I. The Employers and Associations Violated 42 U. S. C. § 1981 Because They Denied to Minorities the Same Right to Make and Enforce Employment Contracts as Was Enjoyed by Whites

In light of the arguments made by petitioners, it is necessary to identify at the outset the issues that are and are not present. One recurring theme asserted by petitioners is that they cannot be held liable for violating § 1981 because the statute is said to reach only acts of intentional discrimination. This Court has yet to decide whether proof of intent is necessary to establish a § 1981 violation. *See City of Memphis v. Greene*, 451 U. S. 100 (1981). But, even as petitioner Glasgow conceded in the Court of Appeals, a resolution of this difficult problem is not required in this case.[26]

It is undisputed that the employers' and associations' exclusive hiring agent practiced intentional discrimination in filling the employers' workforces. Thus, even under the most rigorous evidentiary standards, § 1981 was violated. The question then is who is responsible for the hiring hall's intentional discrimination—the Union, the employers and associations, or all parties? Finding that the duty to comply with § 1981 was non-delegable and, alternatively, that the Union and the employers, acting through the associations, had established a joint enterprise, with the hiring hall being the agent for each, the District Court held all parties liable.[27] That conclusion brings up for review a

26. Brief of Glasgow, Inc., No. 80-2161, at 14.

27. We emphasize that the District Court did not hold petitioners liable on the theory that § 1981 prohibited employment practices with an unjustified discriminatory effect. The District Court did conclude that proof of intent was not necessary under § 1981, but this conclusion (1) represents an alternative basis for the *Union's* liability (PA. 164-167), and played no part in the § 1981 holding against the employers and associations; and (2) was *dictum* inasmuch as the court had earlier concluded that the Union had practiced intentional discrimination (PA. 160-162). The employers and asso-

limited but important question of law: are the employers and associations exempt from injunctive liability under § 1981 when intentional discrimination takes place in the employers' workforces through the instrumentality of the hiring hall system they created with Local 542?[28]

A. Section 1981 Imposes on Employers and Trade Associations a Non-delegable Duty to Afford Minorities the Same Right to Enter Into Employment Contracts as Is Enjoyed by Whites

The pivotal issue in this case turns on the nature of an employer's responsibility under § 1981 when, rather than directly hiring employees through foremen or supervisors, it signs a labor contract establishing a union hiring hall as the exclusive source for the selection of its employees.[29] Plaintiffs submit, and the District Court held, that the duty is no different from an employer's § 1981 obligation in any other employment context. Certainly nothing in the language or legislative history of § 1981 creates or suggests

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27. (Cont'd.)

ciations were held liable under § 1981 "as a result of their contractual relationship to and use of a hiring hall system which in practice effectuated intentional discrimination, whether or not the employers knew or should have known." (PA. 168; *see also* PA. 195).

28. In arguing that the intent vs. effect issue need not be decided here, we do not concede that § 1981 requires proof of intent. *See* the dissenting opinions of Judges Aldisert and Gibbons in *Croker v. Boeing Co.*, 27 [CCH] E. P. D. ¶ 32,160, at 22,324-33 (3d Cir. 1981). We also observe that, even if an intent requirement is present in § 1981, the elements for proving intent in a *statutory* case are often less strict than those in a *constitutional* case, because statutory violations by private parties do not implicate considerations of deference to legislative or executive governmental decisions. *Compare Radio Officers Union v. NLRB*, 347 U. S. 17, 42-52 (1954) and *NLRB v. Great Dane Trailers, Inc.*, 388 U. S. 26, 33-34 (1967), *with Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 265-266 (1977).

29. The same question applies to the trade associations which, in this case, negotiated an industry-wide, standard agreement to which all Local 542 employers adhered (PA. 29, 141, 195, JA. 325).

an exemption or special treatment for employers that rely on exclusive hiring halls for their workers.[30] To the contrary, an employer's duty to fill its own workforce without discrimination is unequivocable and non-delegable. "There is an inflexible duty not to discriminate." (PA. 110).

When employers are subject to a non-delegable duty, they are liable for its breach regardless of whether the instrumentality they have selected, and which caused the breach, is characterized as a "servant", "agent" or "independent contractor". *See generally* 2 Harper & James, The Law of Torts, § 26.11 (1956) (hereinafter "Harper & James"); W. Prosser, Law of Torts, 470-472 (4th ed. 1971). Similarly, in non-delegable duty cases, it is legally irrelevant whether the employer retained the right to control the instrumentality it set in motion. *Petition of Alva S. S. Co., Ltd.*, 616 F. 2d 605, 609 (2d Cir. 1980); 2 Harper & James, *supra*, § 26.11 at 1406. To determine whether a statute imposes a non-delegable duty, courts look to the language and purposes of the statute under consideration. *Id.*

Our analysis therefore begins with the language of § 1981. The statute provides in clear and unambiguous terms that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .

This statute, enacted in § 1 of the Civil Rights Act of 1866, was the first law passed by Congress guaranteeing racial equality. It did not simply create a remedy to vindicate pre-existing rights; instead, it created and made part of the positive law, new rights. Under this statute, minorities have an unqualified right to enter into employ-

30. *Accord, Fruin-Colnon Corp. v. NLRB*, 571 F. 2d 1017, 1020-21 (8th Cir. 1978) (rejecting attempts by construction trades employers to gain a judicially created immunity under the National Labor Relations Act for acts of discrimination by exclusive hiring halls against non-union members).

ment contracts on the same basis as whites. But contracts of employment are not made between an applicant for employment and a hiring agent, be that agent a foreman or a union hiring hall. They are made with employers. Unless the right created has no meaning, § 1981 imposes a duty on every *employer* to afford minorities the same right as whites to contract with it for employment.

This Court has repeatedly held that the 1866 Civil Rights Act is to be given a sweep as broad as its language permits. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U. S. 273 (1976); *Runyon v. McCrary*, 427 U. S. 160 (1976); *Johnson v. Railway Express Agency*, 421 U. S. 454 (1975); *Tillman v. Wheaton-Haven Rec. Assn.*, 410 U. S. 431 (1973); *Sullivan v. Little Hunting Park*, 396 U. S. 229 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409 (1968). If the language of § 1981 is to control, the judgment must be affirmed. Unquestionably, minority operating engineers did not have the "same right" to make employment contracts with the employers "as [was] enjoyed by white[s]." Solely because of their race, hundreds of minorities were totally excluded from the industry and could not enter into employment contracts with any employer; those minorities allowed into the industry suffered discrimination in referrals, and thus they too were denied the same right as whites to contract with the employers. Indeed, not one of the employers or associations who are petitioners here has ever claimed, nor could they, that minorities had the same right as white operating engineers to contract for employment.

The language of § 1981 therefore reveals the central fallacy in petitioners' argument: the duty which the statute imposes on employers cannot be delegated away. Obviously, an employer may choose to vest hiring authority in whomever it wishes; but regardless of whom it selects, the duty to comply with the statute remains with the employer.

The suggestion that an employer's responsibility under § 1981 is dependent on its own choice of a hiring agent certainly finds no support in the statute. And no other

source of law authorizes the circumvention of § 1981 which the employers and associations seek here. The labor laws allow employers in the construction industry to choose a union hiring hall as their exclusive hiring agent; they equally allow those employers to choose anyone other than a union to hire their workers.[31] Whichever choice is made, the labor laws do not authorize employers to delegate away their own duties under § 1981 to a hiring hall or to anyone else. Similarly, the labor laws allow unions and employers to make binding collective bargaining agreements; but those agreements cannot diminish the parties' responsibilities under the civil rights laws. *Franks v. Bowman Transp. Co.*, 424 U. S. 747, 778-779 (1976). The rights guaranteed by the civil rights laws "are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert." *Robinson v. Lorillard Corp.*, 444 F. 2d 791, 799 (4th Cir.), *cert. denied*, 404 U. S. 1006 (1971).

Statutes protecting employment rights have consistently been held to impose personal and non-delegable duties on employers. What Judge Cardozo said more than 60 years ago about one such statute is equally applicable to § 1981:

> [The statute] is directed primarily against the employer, and only secondarily against others as they may aid and abet him. He must neither create nor suffer in his business the prohibited conditions. The command is addressed to him. *Since the duty is his, he may not escape it by delegating it to others. . . . The personal duty rests on the employer to inquire into the conditions prevailing in his business.* He does not rid himself of that duty because the extent of the business may preclude his personal supervision, and com-

31. *See Local 357, Int'l. Bro. of Teamsters v. NLRB*, *supra*, 365 U. S. at 676-677 (1961) ("[T]he hiring hall . . . is a matter of negotiation between the parties. The Board has no power to compel directly or indirectly that the hiring hall be included or excluded in collective agreements."). *Contractors Ass'n. of Eastern Pennsylvania v. Secretary of Labor*, *supra*, 442 F. 2d at 174.

> pel reliance on subordinates. *He must then stand or fall with those whom he selects to act for him.* He is in the same plight, if they are delinquent, as if he had failed to abate a nuisance on his land or had failed to furnish a safe place of work. *It is not an instance of respondeat superior. It is the case of the non-performance of a non-delegable duty.* There are a host of other provisions in the Labor Law where the duty must be held personal, or we nullify the statute.[32]

Similarly, the non-delegable nature of the duties imposed by civil rights laws cuts across the fabric of our jurisprudence. Thus, Title VII and § 1981 hold employers responsible for their hiring agents' intentional discrimination.[33] Owners of apartment buildings cannot disclaim responsibilities under the fair housing laws[34] for the intentional discrimination of their rental agents, whether those agents are employees or "independent contractors."[35] This principle has also been a bedrock of the

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32. *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N. Y. 25, 29, 121 N. E. 474, 476 (1918) (citations omitted) (emphasis added). This decision upheld *criminal* liability against a company for violating a child labor law even though company officials had no knowledge of the violation. *See also, e.g., Gulf King Shrimp Co. v. Wirtz*, 407 F. 2d 508, 512 (5th Cir. 1969) (non-delegable duty under Fair Labor Standards Act, 29 U. S. C. §§ 203(e), 212(c)); *Lenroot v. Interstate Bakeries Corp.*, 146 F. 2d 325, 328 (8th Cir. 1945) (same).

33. *See, e.g., Miller v. Bank of America*, 600 F. 2d 211, 213 (9th Cir. 1979) (Title VII and § 1981); *Calcote v. Texas Educ. Found.*, 578 F. 2d 95, 98 (5th Cir. 1978) (Title VII); *Barnes v. Costle*, 561 F. 2d 983, 993 (D. C. Cir. 1977) (Title VII); *Flowers v. Crouch-Walker Corp.*, 552 F. 2d 1277, 1282 (7th Cir. 1977) (Title VII and § 1981); *Anderson v. Methodist Evangelical Hosp. Inc.*, 464 F. 2d 723, 725 (6th Cir. 1972) (Title VII); 29 C. F. R. § 1604.11(c) (EEOC Regulation).

34. 42 U. S. C. § 1982 (§ 1 of the Civil Rights Act of 1866) and 42 U. S. C. § 3604 (Title VIII of the Civil Rights Act of 1968).

35. *E.g., Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F. 2d 548, 552 (9th Cir. 1980) (§ 1982); *Marr v. Rife*, 503 F. 2d 735,

Fourteenth Amendment. From the earliest decisions, this Court has held that the state is responsible for the intentional discrimination of its agents in performing state actions.[36] Thus, the state is responsible when its agents (be they employees or private persons) select a jury, conduct or count votes in an election, operate a municipal park, or control access to leased state property.[37]

The civil rights statutes in general, and the 1866 Act in particular, present a situation "wherein the law views a person's duty as so important and so peremptory that it will be treated as non-delegable." *See* 2 Harper & James, *supra,* § 26.11 at 1406. The 1866 Civil Rights Act was passed to ensure that minorities would have "practical freedom", *Jones v. Mayer, supra,* 392 U. S. at 431 (*quoting* Sen. Trumbull), and that the Thirteenth Amendment would not be a "mere paper guarantee." *Id.* at 443. The most important right guaranteed by § 1981 is equal employment opportunity, and this Nation's commitment to vindicate that right fully is of the "highest priority." *Alexander v. Gardner-Denver Co.,* 415 U. S. 36, 47 (1974).

Guarantees of racial equality would be meaningless if the duty to comply with them could be delegated. *Ex parte Virginia, supra,* 100 U. S. at 346-348. Granting an immunity to the party on whom the obligation is imposed

35. (Cont'd.)
740-742 (6th Cir. 1974) (Title VIII); *Izard v. Arndt,* 483 F. Supp. 261 (E. D. Wisc. 1980) (§ 1982); *Bradley v. John M. Brabham Agency, Inc.,* 463 F. Supp. 27, 31-32 (D. S. C. 1978) (Title VIII); *Harrison v. Otto G. Heinzeroth Mfg. Co.,* 430 F. Supp. 893 (N. D. Ohio, 1977) (Title VIII); *United States v. Real Estate Development Corp.,* 347 F. Supp. 776, 784 (N. D. Miss. 1972) (Title VIII).

36. *Ex parte Virginia,* 100 U. S. 339, 346-348 (1879); *Raymond v. Chicago Union Traction Co.,* 207 U. S. 20, 35-38 (1907); *Home Telephone & Telegraph Co. v. Los Angeles,* 227 U. S. 278, 286-288 (1913).

37. *Ex parte Virginia, supra* (jury selection); *Terry v. Adams,* 345 U. S. 461 (1953) (elections); *Nixon v. Condon,* 286 U. S. 73 (1932) (elections); *Evans v. Newton,* 382 U. S. 296 (1966) (municipal park); *Burton v. Wilmington Parking Authority,* 365 U. S. 715 (1965) (leased state property).

would nullify the obligation itself. *Home Telephone & Telegraph Co. v. Los Angeles, supra,* 227 U. S. at 286-288. Petitioners cannot use the hiring hall they set up as a shield against their own duty of affording minorities the same right to contract for employment as was enjoyed by whites. Judge Higginbotham correctly rejected petitioners' arguments to the contrary:

> [E]mployers cannot be permitted, collectively or individually, to use the union as a shield and become oblivious to discriminatory practices whose true harm is revealed in the composition of their own employees. It is still the employer who contracts to hire individuals, even in a hiring hall setting, and that employer should not be free from all responsibility to take steps to alleviate discrimination when found simply because he may be blind to the racial composition of the pool from which workers are referred. Injunctive remedial relief should quite properly be available against such an employer or employers to eliminate discrimination when found. (PA. 194-195).

B. The Employers and Associations Were Correctly Held Liable With Local 542 Since the Hiring Hall Was a Joint Enterprise

The judgment of liability should also be affirmed on the basis of the District Court's alternative holding that "[u]nder every test of agency the union hiring hall was the agent for two principals—the union and the contractors with their respective associations." (PA. 191). Thus, apart from the non-delegable duty imposed by § 1981, the application of conventional agency doctrine to a joint venture provides a narrower basis for affirmance of the judgment.

As the District Court noted, quoting Section 1 of the Restatement (Second) of Agency (1958): "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." (PA. 192-193 n. 61). The District Court made specific findings of fact that each of these elements

was present here. The hiring hall acted not only on behalf of Local 542's members but also on behalf of the employers in replacing their traditional hiring processes (PA. 191). The employers derived substantial benefits from the arrangement by having a constant pool of workers available at 24-hour telephone notice, without the need for personnel employees, foremen or employment agencies to do their recruitment or selection (PA. 24, 191). These benefits resulted in substantial economic savings. Similarly, the Union derived substantial benefits for its members.[38] The collective bargaining agreement itself manifested the requisite mutual consent (*id.*).

Petitioners insist, however, that they did not retain any power to control the hiring process. The District Court found to the contrary (PA. 29-30, 192-193 and n. 61). This is a finding of fact which cannot be set aside unless clearly erroneous. Petitioners have never challenged this finding on that ground; instead, they cite cases stating that an employer does not have unilateral authority over a union hiring hall.[39] But, in cases like this one, where a joint enterprise has been created, the real question under agency law is whether both principals acting together had the right to control, and the answer to this is surely yes. *See Stockwell v. United States,* 80 U. S. 531

38. *See Local 357, Int'l. Bro. of Teamsters v. NLRB, supra,* 365 U. S. at 672 (exclusive hiring halls serve as a means "to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers").

39. Petitioners place most of their reliance on language in *Lummus Co. v. NLRB,* 339 F. 2d 728, 735-736 (D. C. Cir. 1974). Following the cited language, the court stated: "So we think that in applying the responsibility of an employer for the acts of a union the facts of the case must be taken into account. The conclusion must be realistic in the circumstances." *Id.* at 737. The court held that an award of back pay against the employer was improper because only "isolated" instances of discrimination against non-union members were involved, but the court cautioned that a different result could follow if the discrimination were "widespread or repeated" (*id.*).

(1879);[40] 2 Harper & James, *supra* § 26.13. As the District Court found, the employers and associations retained a right equal to the Union's to enforce the collectively-bargained rules governing the operation of the hiring hall (PA. 29-30, 192-193 n. 61). Most significantly, they retained the right to enforce the non-discrimination provision of the collective bargaining agreement (PA. 192). *Cf. International Union of Electrical, Radio & Machine Workers v. NLRB*, 648 F. 2d 18, 25 (D. C. Cir. 1980). The agreement itself recognized the employers' right to refuse operating engineers referred by the hiring hall (PA. 26). The agreement also created an appellate tribunal, with one employer representative, that had the power to grant relief from any violation of the hiring hall's rules (PA. 30, 192-193 n. 61). These and other enforcement mechanisms[41] were available to insure that the contract's rules were obeyed.

The employers and associations respond by asserting that, as a practical matter, they were powerless to uncover the Union's discrimination and by speculating that any corrective steps they might have taken were bound to fail. These claims find no support in the record,[42] and

40. In *Stockwell*, several principals created a joint venture and authorized one of them (Stockwell) to act as their agent in importing merchandise. Stockwell fraudulently and illegally procured false certificates to avoid the payment of customs duties; the other principals had no knowledge of Stockwell's acts. In a civil action brought by the government, the Court held all principals jointly and severally liable for Stockwell's intentional tort and affirmed an indemnity judgment against them of triple the value of the goods. 80 U. S. at 547-550.

41. For example, persuading the hiring hall, through informal or formal methods, to comply with the rules; filing charges with the NLRB or EEOC; insisting at collective bargaining that violations cease as a condition for renewing the exclusive hiring hall arrangement; and seeking relief at compulsory arbitration or in a breach of contract action under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185 (*see Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957) and its progeny).

42. It is noteworthy that following the District Court's liability decision, petitioners, through their master trade association, brought

the District Court's explicit findings are to the contrary. The District Court found that the hiring hall's discrimination was "a matter of such broad scope that some or all contractors and associations might have had knowledge of it." (PA. 168). The court also found that "the employers, particularly through their associations, had the potential collective capacity to be generally conscious of possible discrimination in the hiring hall and to seek to correct it." (PA. 192). And certainly the employers and the associations had the right and power to uncover and oppose discrimination in the JATC, an entity which they helped to create, solely funded, and participated in equally with the Union as trustees.

After much experience in § 1981 and Title VII cases, the courts of appeals have held that each party to a collective bargaining agreement that is used to effectuate racial discrimination is liable unless that party took every reasonable step to prevent or oppose the discrimination. *See, e.g., Terrell v. United States Pipe & Foundry Co.*, 644 F. 2d 1112, 1120 (5th Cir. 1981); *Myers v. Gilman Paper Co.*, 544 F. 2d 837, 850-851 (5th Cir.), *cert. dismissed*, 434 U. S. 801 (1977). But this is not a case where the employers or associations took some steps to prevent or oppose discrimination, with the issue then being whether those steps were adequate. Judge Higginbotham found: "The evidence reveals they did nothing whatsoever." (PA. 192).

Furthermore, other findings of the District Court totally refute petitioners' characterizations of themselves as innocent, powerless bystanders. One of the ironies of this case is that if the employers and associations had

42. (Cont'd.)

an arbitration action against the Union and secured a ruling that they were no longer bound to use the hiring hall (JA. 357-375). Because this belated action would have interfered with the remedial decree that was about to be issued, and because petitioners were transparently seeking after-the-fact exoneration, the District Court stayed the ruling (JA. 381-383). But this incident belies petitioners' claim that they were powerless to oppose the Union's violations.

stood innocently on the sidelines, discrimination in their workforces could have been substantially alleviated, if not remedied altogether. In 1968, the federal government tried to place the employers under the Philadelphia Plan, which the District Court found would have resulted in many more minority operating engineers working for the employers (PA. 36). But the employers resisted, and after the federal government cut off funds, they became, through the associations, "willing parties" to the Union's scheme to defraud the United States and the Commonwealth of Pennsylvania (PA. 31-32, 36-37). This resulted in an industry-wide exemption of the operating engineers craft from the Philadelphia Plan. Discrimination by Local 542 was thereby allowed to continue unabated (PA. 35-37), and the employers and associations returned to their familiar posture of calculated indifference.

In light of all these circumstances, the District Court was correct in finding that the employers and associations were engaged in a joint venture with Local 542 through the creation and maintenance of the hiring hall. It was also correct in concluding that they retained the power to oppose Local 542's intentional discrimination. A contrary finding, in Judge Higginbotham's view, would have been to "effect a withdrawal from reality." (PA. 192).[43]

C. Each Employer Was Properly Held Liable Regardless of Its Individual Workforce Statistics

Discrimination in the industry was of such magnitude that 70% of the 1,488 employers did not employ a single

43. That the hiring hall may have acted disobediently and out of selfish motives is immaterial. *Gleason v. Seaboard Air Line Ry. Co.* 278 U. S. 349 (1929); *New York Central & Hudson River RR Co. v. United States,* 212 U. S. 481, 493 (1909); J. Story, AGENCY, § 45 at 563 (3d ed. 1846). The collective bargaining agreement authorized the hiring hall to register applicants for employment and to refer workers to the employers. Under hornbook principles, the hiring hall was therefore acting within the scope of its agency when it intentionally discriminated against minorities in registration and referrals. 2 Hadper & James, *supra,* §§ 26.7-26.9; Prosser, *supra,* at 461.

minority operating engineer during the three-year period before the complaint was filed. In a labor force that was between 11.5 and 13.9% minority, only a minuscule number of the employers (23, or 1.6% of the total) employed at least 10% minorities (PA. 65-66). None of the petitioner employers is one of these 23 (JA. 273-74); nevertheless they argue that no employer can be held liable, even for purposes of injunctive relief, without first examining its individual workforce statistics. This argument has no merit at Stage I of a defendant class action where only liability and injunctive issues were considered by the District Court.

1. The hiring process that the employers set up is, in every sense of the term, a collective one. There is a standard collective bargaining agreement to which all employers uniformly adhere. That agreement establishes a uniform hiring hall system on which all employers and operating engineers alike must rely.

The employers acted collectively in other critical ways. The collective bargaining agreement requires each employer to fund the JATC; three of the six JATC trustees represent management. When the trade associations became "willing parties" to the Union's scheme to nullify the Philadelphia Plan, they did so on behalf of the entire industry and secured an exemption for all employers, independents as well as association members.

Given the industry-wide nature of the hiring hall system, a make-whole injunctive decree could not effectively apply to some employers and not others. With one hiring hall system referring a common pool of employees, there cannot be one set of rules for referrals to some employers and another set of rules for referrals to others. An industry-wide decree remedying industry-wide discrimination was appropriate, particularly since the District Court found that, for the Decree to be effective, all employers must be included (PA. 205-206).

Judge Higginbotham was therefore correct in refusing to analyze each employer's own workforce statistics at Stage I:

> It is the mass of employers collectively who by originally agreeing to or subsequently adopting the exclusive hiring hall provision, effectuated a *collective* delegation of the employment application process. . . . Inasmuch as the delegation of the application procedure was meant to be industrywide within 542's jurisdiction, and is a product of all those employers agreeing to a single arrangement, those employers must together share responsibility, at least injunctively, for the discrimination by the union (PA. 195) (emphasis in original).

2. Even if the collective liability of the employers were not controlling, each employer individually violated § 1981 regardless of the racial composition of its own workforce. The hiring hall, which was the designated hiring agent for each employer, refused to allow hundreds of minorities to register. Solely because of their race, these minorities were totally excluded from the industry and denied the opportunity to work for *any* employer. In the language of § 1981, they were denied the "same right" as whites "to make and enforce" an employment contract with *any* employer.

To be sure, the hiring hall did register some minorities, who were referred to some employers. But no matter how many minorities were referred to a given employer, hundreds of others were denied any opportunity to work for that or any other employer solely because of their race. As to these minorities, it cannot be maintained that the violation of their rights is somehow negated because other minorities were referred to that employer.

If this were a disparate impact case, petitioners' argument might have some force. But this is a case of intentional discrimination, and an employer is liable to the victims of intentional discrimination, regardless of its workforce representation. *Furnco Construction Co. v. Waters*, 438 U. S. 567 (1978) is directly on point. There the company asserted that it could not be held liable for its hiring agent's alleged discrimination because minorities had been hired at a rate more than twice their representation in the

labor force. Rejecting this defense, the Court held (*id.* at 579):

> A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination. . . . It is clear beyond cavil that the obligation . . . is to provide an equal opportunity for each applicant, regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force.

See also Los Angeles Dept. of Water & Power v. Manhart, 435 U. S. 702 (1978) (holding that the absence of disparate impact against a class did not excuse intentional discrimination against individuals).[44]

Thus, if petitioner United, for example,[45] had selected a foreman to hire operating engineers, and that foreman had rejected certain minorities because of their race, United would be liable to those rejected minorities under § 1981, regardless of its overall hiring statistics. Instead of selecting a foreman, United selected and relied on the hiring hall as its agent. The hall refused to register hundreds of minorities who, because of their race, could not work for United (or for any other employer). United and every other employer violated the rights of these minorities under § 1981.[46]

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44. Although *Furnco* and *Manhart* deal with Title VII, § 1981 by its terms also provides equal opportunity for "[a]ll persons", and, like Title VII, "[t]he statute's focus on the individual is unambiguous." *Manhart, supra*, 435 U. S. at 708. In an intentional racial discrimination case, the standards of proof under Title VII and § 1981 are the same. *See McDonald v. Santa Fe Trail Transp. Co.*, 327 U. S. 273 (1976).

45. We choose United for illustration only. It is not one of the small number of companies with greater than 10% minority hiring.

46. United misconceives the point when it argues that it cannot be held liable for Local 542's discrimination "against persons seeking to become a member of the union" (No. 81-330, Br. at 20). Obtaining Union membership was only one way of being registered; other methods were being accepted into the JATC or being given a registrant card (or "green card"). Minorities were subjected to

3. For the above reasons, the degree to which minorities were represented in individual employer workforces was irrelevant in determining each employer's liability for injunctive relief. Individualized questions of this nature might well be relevant in determining how to allocate a back pay award, but the District Court's bifurcation order left these matters for Stage II of the litigation (PA. 17-18, 132). Stage I was designed to resolve classwide issues only. The decision to bifurcate the case was made in accordance with the provisions of Section 4.12 of the Manual on Complex Litigation and Rule 42, Fed. R. Civ. P. Such a procedure was specifically endorsed in *International Brotherhood of Teamsters v. United States*, 431 U. S. 324, 361 (1977). Especially in light of the complexities of this case, it cannot be said that the bifurcation decision was an abuse of discretion.

D. Each Trade Association Was Properly Held Liable For Its Role in Establishing and Maintaining an Exclusive Hiring Hall and Apprenticeship Program That Practiced Intentional Racial Discrimination

Just as the employers seek to absolve themselves of responsibility for the acts of the hiring hall, the associations seek to extricate themselves from the liability of the employers. They argue that associations do not employ operating engineers and therefore cannot be held responsible for the hiring hall's discriminatory practices. But the central role of the associations in constructing and perpetuating a system that prevented minorities from enjoying the same right as whites to work as operating engineers cannot be so easily erased.

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46. (Cont'd.)

discrimination with respect to each of these methods of entry (PA. 67-72, 121-127), and there was a "pattern of delay or diversion either in acting upon or in entertaining minority applications for hiring hall status as well as a pattern of neglecting to advise these minority applicants or would-be applicants of available methods of entry." (PA. 92). None of these minorities was afforded an opportunity to work with United or any other employer in the defendant class.

First, the associations negotiated the contract that required minorities to seek work with the employers through Local 542's hiring hall (PA. 29). By acting as the employers' negotiating agent, the associations are as much "employers" under the employment discrimination laws as the contractors' management and supervisory personnel.[47]

Second, the associations' selection of Local 542 as the employers' exclusive hiring agent resulted in intentional discrimination throughout the employers' collective workforce. The duty to comply with § 1981 applies to the associations as much as it does to the employers. The associations have a duty to insure that they do not select as their members' exclusive hiring agent an entity that practices intentional racial discrimination. This is particularly critical in the exclusive hiring hall setting because there the associations are leaving their members with no option but to rely on the hiring hall for workers. It is even more critical in this case because the contracts they execute create a standard which effectively binds the entire industry. The associations thus have a much greater influence over and responsibility for employment practices within the industry than any single employer.

Third, pursuant to the contract negotiated by the associations, the hiring hall was their agent as much as the employers. As co-principals to the arrangement with Local 542, they are liable for the hiring hall's violations of § 1981. *See* Section I B, *supra*.

Fourth, the JATC, like the hiring hall, is a joint venture between the associations and the Union. The associations have equal responsibility and authority with Local

47. *E.g., Gibson v. Local 40, ILWU*, 543 F. 2d 1259 (9th Cir. 1976); *Byrd v. Local 24, IBEW*, 375 F. Supp. 545, 560-562 (D. Md. 1974); *United States v. Steamfitters, Local 638*, 360 F. Supp. 979, 994-995 (S. D. N. Y.), *aff'd. sub nom. EEOC v. Enterprise Association Steamfitters*, 542 F. 2d 579 (2d Cir. 1976), *cert. denied*, 430 U. S. 911 (1977); *Williams v. New Orleans Steamship Ass'n.*, 341 F. Supp. 613 (E. D. La. 1972); *NLRB v. Waterfront Employees of Washington*, 211 F. 2d 946, 954 (9th Cir. 1954). *See* § 701 (b) of Title VII, 42 U. S. C. § 2000e (b), which defines "employer" as "a person engaged in an industry affecting commerce . . . *and any agent of such person* . . . ." (emphasis added).

542 for its operation. The JATC is an agent of the associations, and they are therefore liable for the JATC's violations of § 1981.[48] *See* Section I B, *supra*.

Fifth, even more than the employers, the associations had the power to challenge and rectify the Union's and JATC's discrimination (PA. 192). But, Judge Higginbotham found, they "did nothing whatsoever" to combat discrimination (*id.*). Rather, with "reckless disregard" for the rights of minorities (PA. 128), the associations became "willing parties" to the fraudulent scheme to evade the Philadelphia Plan (PA. 37). The associations negotiated and secured an industry-wide exemption of all employers from the Plan; that exemption enabled Local 542's discriminatory practices to be unchecked. As the price for this exemption, the associations readily signed an Affirmative Action Plan, and then ignored the reporting, training and entry commitments in that Plan.

After reciting the associations' role in nullifying the Philadelphia Plan, the District Court observed: "Having sought to enrich their members with substantial profits, it is now too late to cry innocence and cast the blame elsewhere." (PA. 37). But this is precisely what the associations now attempt to do, portraying themselves as innocent bystanders in circumstances over which they had no control. As against this portrayal, there stands the unalterable reality of what the associations actually did. As was stated in an analogous case, it takes much more than a defense of "complete detachment and naivete" to exonerate the associations. *NLRB v. Mountain Pacific Chapter of Assoc. Gen. Con.*, 270 F. 2d 425, 428 (9th Cir. 1959).

E. Section 1981 Holds Employers and Associations Responsible for the Intentional Discrimination of Instrumentalities They Select to Act on Their Behalf

None of the petitioners specifically address the doctrines of non-delegable duty or joint enterprise. However,

48. *E.g., United States v. Plumbers, Local 24*, 364 F. Supp. 808, 830 (D. N. J. 1973) (Garth, J.).

they challenge the District Court's imposition of liability on the ground that principles of vicarious liability are inapplicable to actions brought under § 1981. Petitioners argue that the legislative history of 42 U. S. C. § 1983, an act passed by the 42nd Congress in 1871, demonstrates that the 39th Congress, in 1866, could never have intended that § 1981 would incorporate principles of vicarious liability.

Petitioners' arguments are unavailing. As we point out in subsection 1, *infra*, at the time of the enactment of § 1981 the doctrine of vicarious liability was well established in American jurisprudence, and nothing in the language or legislative history of that statute suggests that Congress intended to abrogate existing vicarious liability principles. Moreover, as noted in subsection 2, *infra*, principles of vicarious liability are routinely applied to statutes which require proof of intent.

1. Section 1981 Incorporates the Doctrine of Vicarious Liability

This Court has frequently recognized that the authors of the Reconstruction statutes "were familiar with common law principles . . . and that they likely intended these common law principles to obtain, absent specific provisions to the contrary." *City of Newport v. Fact Concerts, Inc.*, 101 S. Ct. 2748, 2755 (1981).

By the time that the 1866 Civil Rights Act was passed, the doctrine of vicarious liability was well embedded in the common law. In 1827, the Court, in an opinion written by Justice Story, held that in both civil and criminal cases, "[w]hatever the agent does, within the scope of his authority, binds his principal, and is deemed his act." *United States v. Gooding*, 12 Wheat. 459, 469. *See also, e.g., American Furniture Co. v. United States*, 2 Pet. 357, 364 (1829); J. Story, AGENCY, § 452 (3d ed. 1846). Moreover, on February 5, 1866, while Congress was in the very midst of considering the Civil Rights Bill,[49] the Court decided

49. The Senate voted in favor of the Civil Rights Bill on February 2, 1866. CONG. GLOBE. 39th Cong., 1st Sess. 606-607. The Bill was brought up in the House on March 1 and ultimately passed over the President's veto on April 9. *Id.* at 1861.

another statutory case, *Cliquot's Champagne,* 3 Wall. 114, and held that (*id.* at 140):

> Whatever is done by any agent, in reference to the business in which he is at the time employed, and within the scope of his authority, is said or done by the principal, and may be proved as well in a criminal as in a civil case, in all aspects, as if the principal were the actor or the speaker.

See also Stockwell v. United States, supra.

Since vicarious liability was an integral part of the common law by 1866, under *City of Newport, supra,* it must be presumed, absent evidence of an intention to abrogate it, that the 39th Congress intended to incorporate the doctrine into § 1981. *See Pierson v. Ray,* 386 U. S. 547, 555 (1967). There is no evidence in either the language or the legislative history of § 1981 that Congress chose to preclude vicarious liability from the application of the statute. *Mahone v. Waddle,* 564 F. 2d 1018, 1030-1031 (3d Cir. 1977), *cert. denied,* 438 U. S. 904 (1978). Because employers almost always use agents (e.g., supervisors, foremen or personnel officers) to hire their employees, Congress could hardly have intended the "enormous loophole" that a rejection of vicarious liability would create. *Miller v. Bank of America, supra,* 600 F. 2d at 213. Had it wished to abolish the doctrine, "Congress would have specifically so provided. . . ." *Pierson v. Ray, supra,* 386 U. S. at 555, *quoted in City of Newport, supra,* 101 S. Ct. at 2758.

The Court's holding in *Monell v. Department of Social Services,* 436 U. S. 658, 691-694 (1978), that a municipality may not be held vicariously liable under 42 U. S. C. § 1983 for the acts of its employees, does nothing to diminish support for the proposition that § 1981 incorporates principles of vicarious liability. Section 1981 derives from a different constitutional source, reflects a different congressional purpose and legislative history, and employs significantly different language than § 1983. These factors defeat any argument that the holding in *Monell* is relevant

to the question of whether § 1981 incorporates principles of vicarious liability.

The purpose of § 1983 is purely remedial. By its enactment, Congress did no more than create a cause of action for vindicating pre-existing substantive rights. *Chapman v. Houston W. R. O.*, 441 U. S. 600, 617-618 (1979). The language of the statute reflects this limited purpose. It imposes liability on "any person who, under color of [state] law . . . shall subject, or cause to be subjected, any person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution. . . ." This language "cannot be easily read to impose vicarious liability solely on the basis of an employer-employee relationship with a tortfeasor." *Monell, supra,* 436 U. S. at 692.

Section 1981, on the other hand, does not merely create a cause of action for enforcement of pre-existing rights. Rather, by the enactment of § 1981, Congress created substantive rights and duties where none existed before. *Runyon v. McCrary, supra,* 427 U. S. at 170-171. To achieve this end, Congress chose language which is declarative, unqualified and fully compatible with the imposition of vicarious liability. Consistent with the Act's purpose, this Court has construed § 1981 as broadly as possible to achieve the congressional objective of racial equality. *McDonald v. Santa Fe Trail Transp. Co., supra; Runyon v. McCrary, supra; Johnson v. Railroad Express Agency, supra.*

Just as the purpose and language of Sections 1981 and 1983 are different, so are their derivation and legislative history. *See District of Columbia v. Carter,* 409 U. S. 418, 423 (1973); *see also Runyon v. McCrary, supra,* 427 U. S. at 168-170; *Tillman v. Wheaton-Haven Rec. Ass'n., supra,* 410 U. S. at 440 n. 11. The 1866 Act was enacted to enforce the proscriptions of the Thirteenth Amendment, while the 1871 Act was passed to enforce the provisions of the Fourteenth. *District of Columbia v. Carter, supra,* 409 U. S. at 423. "This distinction has great significance", *id.,* since "[d]ifferent problems of statutory meaning are presented by two enactments deriving from different con-

stitutional sources." *Monroe v. Pape,* 365 U. S. 167, 205-206 (1961) (separate opinion of Frankfurter, J.), *quoted* in *Carter, supra,* 409 U. S. at 423.

Petitioners cite the 42nd Congress' rejection of the Sherman Amendment to § 1983 as conclusive evidence that the 39th Congress, five years earlier, intended to reject the application of vicarious liability to § 1981. No such inference of legislative intent can reasonably be drawn. The Sherman Amendment was rejected as "an extreme example of 'riot act' legislation", *Monell, supra,* 436 U. S. at 706 (Powell, J., concurring), and for reasons which had nothing to do with defining the limits of common law vicarious liability, and everything to do with concerns for federalism and the constitutional limits of Congress' power to impose police obligations on municipalities and other instrumentalities of the States. *Id.* at 669-683; *see especially id.* 436 U. S. at 675 (statement of Representative Blair in opposition to amendment), at 679,[50] and at 693.[51]

Given the 42nd Congress' pre-occupation with whether the Sherman Amendment conflicted with the constitutional doctrine of federalism, the legislative history of this amendment has little, if any, relevance to § 1981, which imposes no police obligations on any local government. It has even less relevance to the petitioners in this case, all of whom are private parties.[52]

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50. Justice Brennan observed that:

> . . . there was ample support for . . . [the] view that the Sherman amendment . . . attempted to impose obligations on municipalities by indirection that could not be imposed directly, thereby threatening to "destroy the government of the States." (citation omitted).

51. In rejecting *respondeat superior* as a basis of liability under § 1983, the Court observed that "creation of a federal law of *respondeat superior* would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional." *See City of Newport v. Fact Concerts, Inc.,* 101 S. Ct. 2748, 2759 (1981).

52. Although the differences between § 1981 and § 1983 which have been cited are sufficient to distinguish *Monell,* it should be

2. Principals Are Vicariously Liable Under Laws Requiring Proof of Intent for Their Agents' Intentional Acts

Many laws require proof of intent as a necessary element of the violation; however, principals are commonly held liable for the intentional torts of their agents or partners, whether or not the principals themselves had actual or constructive knowledge of the wrongdoing. This doctrine has governed tort law for so long that doubts as to its validity are "now a matter of history." 2 Harper & James, *supra*, § 26.9, at 1389 (1956).[53]

This rule applies in statutory cases. In 1879, this Court summarized earlier decisions and squarely held that

52. (Cont'd.)

noted that in a § 1983 employment discrimination case, the inapplicability of vicarious liability to that statute would not affect the availability of complete injunctive relief. Minorities who were denied municipal employment due to intentional discrimination by a city's hiring agents could obtain injunctive relief against not only the agents individually, but also against city officials in their official capacities. Minorities could thereby secure the city jobs to which they were entitled, and this relief would be fully effective against the municipality. *See Monell, supra*, 436 U. S. 711-712 (Powell, J., concurring); 716 n. 2 (Rehnquist, J., dissenting). Identical injunctive relief would be available in a § 1983 suit against a state, even though a state cannot be a defendant under § 1983. *See, e.g., Quern v. Jordan*, 440 U. S. 332, 337, 345-349 (1979); *Hutto v. Finney*, 437 U. S. 678, 690-691 (1978). Whatever barriers there may be to obtaining monetary relief from a city do not affect the availability of injunctive relief. *See Ex parte Young*, 209 U. S. 123 (1908). Liability for injunctive relief is the only issue raised by these appeals.

53. The leading English case is *Limpus v. London General Omnibus Co.*, 1 H. & C. 526, 158 Eng. Rep. 993 (1862). More recent state decisions include *Sayers v. Boyles*, 380 Ala. 153, 190 So. 2d 707 (1966); *Nason v. Voight*, 128 Ariz. 385, 625 P. 2d 974 (1981); *Fitzgerald v. Edelen*, 623 P. 2d 418 (Colo. 1980); *Bower v. Uezzel*, 94 Idaho 951, 500 P. 2d 852 (1972); *Liberty National Bank & Trust Co. v. Gruenberger*, 477 S. W. 2d 503 (Ky. 1972); *Nyer v. Carter*, 367 N. E. 2d 367 (Me. 1977); *Tietjens v. General Motors Corp.*, 418 S. W. 2d 75 (Mo. 1967).

both precedent and reason rejected the notion that "in all cases where knowledge is by statute essential to liability . . . the knowledge of the agent or partner is regarded as distinct from that of the principal." *Stockwell v. United States, supra,* 80 U. S. at 548. The governing rule was, on the contrary, that (*id.*):

> . . . when a loss must fall upon one of two innocent persons, he must bear it who has been the occasion of the loss or has enabled a third person to cause it. In other words, the tortious act of the agent is the act of his principals, if done in the course of his agency, though not directly authorized.

Similarly, in *New York Central & Hudson RR. Co. v. United States,* 212 U. S. 481, 493 (1909), the Court stated that this rule governed even when the agent's act was "done wantonly or recklessly or against the express orders of the principal." The Court went on to hold a corporate employer criminally liable by imputing to it the agent's acts and intent. *Id.* at 494. *See also Telegram Newspaper Co. v. Commonwealth,* 172 Mass. 294 (1899); *Higgins v. The Watervliet Turnpike Co.,* 46 N. Y. 23 (1871).

There are many more contemporary examples of vicarious liability in the context of statutory prohibitions requiring proof of intent.[54] A situation analogous to the present case is found in decisions under Sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U. S. C. § 158(a)(1), (3), which prohibit employers from discriminating against non-union workers for the purpose of encouraging or discouraging union membership. While emphasizing that these provisions reach only purposeful discrimination, the Court held that an employer unlaw-

54. *See, e.g., United States v. Bausch,* 596 F. 2d 871, 877-78 (9th Cir. 1979); *Packing House & Industrial Services, Inc. v. NLRB,* 590 F. 2d 688 (8th Cir. 1978); *Texas Aluminum Co. v. NLRB,* 435 F. 2d 917, 919 (5th Cir. 1970); *United States v. Armour Co.,* 168 F. 2d 342 (3d Cir. 1948); *In re Mifflin Chemical Corp.,* 123 F. 2d 311 (3d Cir. 1941), *cert. denied sub nom. Sheridan v. Rothensies,* 315 U. S. 815 (1942).

fully discriminated against an applicant for employment when it was coerced into not hiring him by a union; the union's motivation—to encourage union membership—was imputed to the employer. *Radio Officers Union v. NLRB, supra,* 347 U. S. at 28-38, 52. Similarly, the courts of appeals have held that when an employer delegates its hiring to a hiring hall, and the hall does not refer non-union workers because of intentional discrimination, the employer as well as the union is liable. *Morrison-Knudsen Co. v. NLRB,* 275 F. 2d 914 (2d Cir. 1960), *cert. denied,* 366 U. S. 909 (1961).[55]

The same rule applies in constitutional cases. Proof of purposeful discrimination is essential to establish that a state has denied the equal protection of the laws.[56] But, "it is perfectly clear that to violate the Equal Protection Clause the state itself need not make, advise or authorize the private decision to discriminate that involves the state in the practice of segregation . . . ," *Gilmore v. City of Montgomery,* 417 U. S. 556, 582 (1974) (White, J., concurring). Thus, for example, when a lessee of state property purposefully excludes blacks from that property, the state

55. This decision held the employer liable "regardless of the extent of [its] knowledge." 275 F. 2d at 917. *Accord, NLRB v. Int'l. Bro. of Electrical Workers, Local 322,* 597 F. 2d 1326, 1330 n. 9 (10th Cir. 1979); *Pacific Maritime Ass'n. v. NLRB,* 452 F. 2d 8 (9th Cir. 1971); *NLRB v. H. K. Ferguson Co.,* 337 F. 2d 205 (5th Cir. 1964), *cert. denied,* 380 U. S. 912 (1965); *cf. NLRB v. United States Steel Corp.,* 278 F. 2d 896, 898 (3d Cir. 1960), *cert. denied,* 366 U. S. 908 (1961).

In some cases where back pay liability was sought for an isolated instance of discrimination, courts have required proof of actual or constructive knowledge. *NLRB v. Master Stevedore's Ass'n. of Texas,* 418 F. 2d 140 (5th Cir. 1969); *Lummus Co. v. NLRB, supra,* 339 F. 2d at 737. But such proof is not required for back pay liability when the discrimination is "widespread or notorious", *id.;* and no such requirement has ever been suggested when only injunctive relief was sought.

56. *E.g., Washington v. Davis,* 426 U. S. 229 (1976); *Snowden v. Hughes,* 321 U. S. 1, 7-11 (1944).

is liable along with its lessee. *Burton v. Wilmington Parking Authority, supra.*[57]

In each of the above cases, liability was imposed even though the principal had no actual or constructive knowledge of his co-principal's or agent's intentional acts. Thus, it cannot be argued that to hold the employers and associations vicariously liable under § 1981 would break with legal tradition. To the contrary, affirmance of the judgment of liability would be completely consistent with settled legal concepts.

F. Policy Considerations Support the Imposition of Liability on the Employers and Associations

Petitioners advance several policy arguments for exempting them from liability for the intentional discrimination of the Union and the JATC. But § 1981 is unqualified on its face. It does not exempt any employer or association, nor does it make the guarantee of racial equality dependent on the type of hiring agent an employer selects. Considerations of policy cannot create an exemption that Congress refused to give. *See Tennessee Valley Authority v. Hill,* 437 U. S. 153, 194-195 (1978); *Runyon v. McCrary, supra,* 427 U. S. at 168-173. *See also United States v. Hartwell,* 73 U. S. 385, 396 (1867) ("If the language be clear it is conclusive"). But even if the reach of § 1981 were to be determined by policy rather than its language, a weighing of policy strongly supports the District Court's decision.

Petitioners' two policy arguments for avoiding responsibility are that it would be unfair and inequitable to impose liability on them merely for selecting a union hall as their hiring agent, and that the imposition of liability on them will undermine the utility of hiring halls in the construction industry. Neither of these arguments has merit, either as a general proposition or when considered in light

57. *See* L. H. Tribe, AMERCAN CONSTITUTIONAL LAW, § 18-3, at 1159-1160 (1978); *see also Derrington v. Plummer,* 240 F. 2d 922 (5th Cir. 1956), *cert. denied,* 353 U. S. 924 (1957); *Coke v. City of Atlanta,* 184 F. Supp. 579 (N. D. Ga. 1960).

of the facts found by the District Court. Moreover, petitioners fail to even address the overriding policy issue with which Congress was concerned when it enacted § 1981: eliminating intentional race discrimination in employment.

1. As a general matter, there is nothing unfair or inequitable in holding these employers and associations liable for injunctive relief. The employers and associations made a business decision to use an exclusive hiring hall to hire operating engineers, instead of using foremen, personnel officers or an employment agency. They derived substantial benefits from this arrangement in having a pool of qualified employees readily available on 24-hour notice at no cost to them. To be sure, there were negative aspects to this arrangement. It increased the Union's power over wages and other conditions of employment. It also exposed the employers to increased litigation risks. If the Union referred incompetent or malingering workers, serious accidents could occur, and construction projects might not be finished on time. Tort or contract liability against the employers might then ensue.

The employers and associations decided, with open eyes, to weigh these considerations in favor of delegating traditional management perogatives to the hiring hall. They are liable under § 1981 for the consequences of this decision—intentional racial discrimination practiced through the hiring hall. Holding them liable for discrimination in the industry's workforce is hardly inequitable.[58]

Nor are the equities changed by the employers' and associations' claim that they were coerced into the hiring hall arrangement. This claim is highly exaggerated. The

58. *See Harrison v. Otto G. Heinzeroth Mortgage Co.*, 430 F. Supp. 893 (N. D. Ohio, 1977), where, in response to the argument that it was unfair to hold a "well-intentioned" corporation liable for damages for "the disobedient wrongful acts" of its agents in violation of the Fair Housing Act, the court responded (*id.* at 897):

> [G]reat evils require strong remedies, and the old rules of the law require that when one of two innocent people must suffer, the one whose acts permitted the wrong to occur is the one to bear the burden of it.

contract creating the exclusive hiring hall has been signed by the associations and employers every two or three years since 1961. The record is totally devoid of evidence that the Union in any way pressured the associations or employers since 1963 (PA. 23). Nevertheless, no employer or association has proposed to eliminate the hiring hall in any contract negotiations over the last 18 years.[59] This is despite the finding that the employers and associations had the collective capacity to be conscious of the hiring hall's discrimination and to take actions to correct it. Yet, they did nothing whatsoever (PA. 192). Furthermore, it certainly could not be claimed that the employers and associations were coerced into creating the JATC and tolerating its discrimination, or that they were coerced into becoming "willing parties" in the fraudulent scheme to evade the Philadelphia Plan, or that they were coerced into breaching the reporting and training commitments they made in return for being exempted from the Plan.

Much stronger claims of economic coercion have been consistently rejected. Neither neutrality nor fears of economic reprisals by unions such as Local 542 permits an employer to avoid its own duty under § 1981. *Macklin v. Spector Freight Systems, Inc.*, 478 F. 2d 979, 989 (D. C. Cir. 1973); *Robinson v. Lorillard Corp., supra*, 444 F. 2d at 799.[60] As found by Judge Higginbotham: "Economic considerations affecting [the] bargaining process raised here by defendants do not provide an excuse from duties incident to employee selection in this case." (PA. 192).

2. It is also suggested that imposing even injunctive liability on the employers and associations would prevent

59. In the 1963 negotiations, the Union reported that the associations accused it of practicing racial discrimination (JA. 139).

60. The same is true with respect to employer liability under the NLRA for union-coerced discrimination against non-union members. *Radio Officers Union v. NLRB, supra; Local 357, Int'l. Bro. of Teamsters v. NLRB, supra*, 365 U. S. at 681 (Harlan, J., concurring). *See NLRB v. Insurance Agents*, 361 U. S. 477, 495 (1960) ("[T]he use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining.").

employers from entering into exclusive hiring hall contracts. One might consider it peculiar that this suggestion is made by the very same employers and associations who, in almost the same breath, strenuously deny that they want an exclusive hiring hall.[61] No doubt affirmance of the District Court's judgment may have an effect on the way hiring halls are operated, but this effect will not be the one predicted by petitioners. Only one year after the Landrum-Griffin Act was passed, the Court of Appeals for the Second Circuit held that employers were liable both injunctively and for back pay for their hiring hall's intentional discrimination against non-union members. *Morrison-Knudsen Co. v. NLRB, supra.* That decision did not sound the death knell for exclusive hiring halls. To the contrary, they have flourished ever since. *See, e.g.,* United States Department of Labor, EXCLUSIVE UNION WORK REFERRAL SYSTEMS IN THE BUILDING TRADES, *supra,* at 21-34. It did provide an inducement for employers to be alert for possible discrimination in the hiring of their workers and to take corrective steps. A similar effect in the context of racial discrimination would be salutary for all concerned.

3. There are other considerations which are determinative in a public policy analysis. Primary among them is the high national priority in eliminating racial discrimination in employment. *Alexander v. Gardner-Denver Co., supra,* 415 U. S. at 47. If the employers' and associations' liability for injunctive relief is negated because of the kind of hiring agent they create and utilize, an avenue will be marked for easily evading the responsibilities imposed by § 1981. *Miller v. Bank of America, supra,* 600 F. 2d at 213. The effect of such a ruling would be felt

61. *See* JA. 310. This apparent contradiction becomes even more unusual when one considers petitioners' post-liability effort at arbitration to vitiate the hiring hall (*see* n. 42, *supra*) and their proposals to the District Court that the Decree include a provision allowing them to hire operating engineers directly. *See* Response of Defendant Contractor Associations and Contractor to Plaintiffs' Proposed [Injunctive] Order, at 4 (Docket #782, JA. 35).

in other areas of anti-discrimination as well. Owners of apartment buildings have already insisted, thus far unsuccessfully, that they cannot be held liable for the intentional discrimination of rental agents, including those who were said to be "independent contractors."[62] Could the decision in *Jones v. Mayer Co.* be vulnerable to such an expedient? And one need not be prescient to suspect that private schools may retain "independent contractors" to select their students. Would the decision in *Runyon v. McCrary* survive this?[63]

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62. *See, e.g., Northside Realty Associates, Inc. v. United States,* 605 F. 2d 1348, 1353-1354 (5th Cir. 1979) and cases cited in n. 35, *supra.*

63. *Amicus* National Contractors Association ("NCA") argues that the exemption which petitioners seek is implicit in Title VII and should therefore be grafted onto § 1981. (Br. at 16-17). *Amicus* relies entirely on an isolated statement about hiring halls made by Senator Clark in response to a question posed by Senator Dirksen (110 CONG. RECORD 7217) (Clark memorandum). This argument has no merit.

First, we deal here with the scope of § 1981 and not Title VII. The Court has held that the two statutes are independent of one another, *Johnson v. Railway Express Agency, Inc., supra,* 421 U. S. at 459-461, and none of the exemptions in Title VII was intended by Congress to apply to § 1981. For example, § 1981 contains none of the following Title VII exemptions: 42 U. S. C. § 2000e(b) (exempting employers not in an industry affecting interstate commerce or with fewer than 15 employees); § 2000e-1 (exempting employment of aliens outside any state and partially exempting religious institutions); § 2000e-2(f) (exempting employees who are members of Communist Party); § 2000e-5 (jurisdictional requirements for suit); § 2000e-11 (exempting veterans' preference statutes).

Second, even if this were a Title VII case, controlling weight should not be given to the single statement in the Clark memorandum. The language of Title VII is clear and does not immunize employers who create and rely on exclusive hiring halls. Furthermore, neither Senator Clark's statement nor Senator Dirksen's question indicates the type of hiring hall system they were considering. Certainly, they could not have contemplated a factual situation such as this, involving massive, industry-wide violations in which the

Perhaps these predictions are as speculative as petitioners'. But there is one thing which is certain—inclusion of the employers and the associations in the Decree is essential to remedy the violations of plaintiffs' rights. It is now clear, after years of experience in combatting the intransigent racial discrimination in the construction trades, that remedies addressed only to unions, or only to employers, are inherently deficient.[64] In this case, the District Court found that the rights of the plaintiff class could be restored only by directing a remedy against the employers and associations as well as the Union and

63. (Cont'd.)

employers and their associations were directly implicated. Nor does the statement of Senator Clark contemplate a hiring hall arrangement where the employers and their associations retained the power to oppose the discrimination but, instead, took steps which made possible the continuation of that discrimination. Moreover, the operative substantive sections of Title VII were modeled after the National Labor Relations Act, *Albemarle Paper Co. v. Moody*, 422 U. S. 405, 419-420 & n. 12 (1975), and Congress was undoubtedly aware of decisions holding employers liable for union-induced discrimination. *See, e.g., Radio Officers Union v. NLRB, supra; Morrison-Knudsen Co. v. NLRB, supra.* Finally, the Clark statement, if construed as suggested by NCA, is inconsistent not only with the language but the purposes of Title VII. *See Griggs v. Duke Power Co.*, 401 U. S. 424, 429-430 (1971). Under these circumstances, this statement would not be controlling in a Title VII case, as other statements in that memorandum have also been found unpersuasive. *See County of Washington v. Gunther*, 101 S. Ct. 2242, 2249 n. 12 (1981); *United Steelworkers of America v. Weber, supra*, 443 U. S. at 207 n. 7 (1979); *id.* at 215 (Blackmun, J., concurring); *Griggs v. Duke Power Co., supra*, 401 U. S. at 434 & n. 11.

64. *See, e.g.*, Comptroller General's Report to Congress, FEDERAL EFFORTS TO INCREASE MINORITY OPPORTUNITIES IN SKILLED CONSTRUCTION CRAFT UNIONS HAVE HAD LITTLE SUCCESS (1979); United States Commission on Civil Rights, THE CHALLENGE AHEAD: EQUAL OPPORTUNITY IN REFERRAL UNIONS (1976); H. Hill, LABOR UNION CONTROL OF JOB TRAINING: A CRITICAL ANALYSIS OF APPRENTICESHIP OUTREACH PROGRAMS AND THE HOMETOWN PLANS (1974).

JATC (PA. 205-206, 232). The correctness of this approach has been demonstrated. The Decree has been in effect for only one year; the number of minorities in the industry has increased substantially, and their percentage of work has more than doubled. The employers exceeded their first-year goals in every district of the Union (Addendum B). This has been accomplished without the necessity of "bumping" or catch-up quotas—the Decree only provides minorities with their fair share of work, in phased-in steps, over a period of five years (PA. 225). For the first time, equality of employment opportunity is a realizable goal in eastern Pennsylvania and in Delaware. Progress toward achieving this goal should continue unimpaired.

II. The District Court Possessed the Power to Issue an Injunction Against the Employers and Associations and to Assess Remedial Costs for Its Implementation Again All the Named Defendants

Petitioners CAEP, UCA and Glasgow contend that the District Court lacked power to issue an injunction against them or any other employer or association because they were not "wrongdoers". These petitioners, as well as GBCA, also claim that they should not have been assessed any of the costs necessary for the implementation of the District Court's Decree. Both these arguments lack merit. The District Court's power was firmly embedded in traditional principles of equity jurisdiction. Furthermore, independent of the court's equitable power, the All Writs Act authorized the inclusion of the defendant class in the District Court's Decree.

A. The Court's Equitable Power Authorized the Inclusion of the Employers and Associations in the Injunctive Decree to Secure Prospective Compliance With Section 1981

Having found that the rights which § 1981 secured to the plaintiff class had been violated by the Union, JATC, associations and employers, the District Court had "not

merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U. S. 145, 154 (1965). *See also, e.g., Franks v. Bowman Transp. Co., supra*, 424 U. S. at 770. The District Court concluded that the prospective elimination of continuing § 1981 violations necessitated the inclusion of the employers and associations in the injunctive order (PA. 205-06, 223). Several reasons compelled that conclusion, and the order fully complies with the principle that the scope of an equitable remedy is determined by the nature and scope of the violation. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U. S. 1, 16 (1971).

First, the District Court found that minorities were discriminatorily denied jobs and wages as operating engineers as a result of the employers' reliance on Local 542 as their exclusive hiring hall agent. The employers, not Local 542 or the JATC, were the only parties who could remedy that violation.[65] *Cf. Camp v. Boyd*, 229 U. S. 530, 551 (1913) ("A court of equity ought to do justice completely and not by halves."). The District Court therefore concluded that it was "unquestionably necessary" to impose a minority-hours goal on the employers to prevent further discrimination from occurring (PA. 223). Peti-

65. Merely imposing a referral quota on Local 542 would have been insufficient for several reasons. First, some referrals last just a few days; others result in steady, long-term employment. The evidence showed that minorities typically received many short-term referrals, while whites typically received just a few referrals that lasted for years. Therefore, "[c]alculating referrals as such does nothing, after all, to distinguish between short term, undesirable jobs and desirable ones." (PA. 120). Second, the employers, not Local 542, control the number of hours that operating engineers work. No referral quota on Local 542 could guarantee minorities non-discrimination in hours. Nor could non-discrimination be achieved by relieving the employers of their contractual obligation to rely on the hiring hall. That too would not assure minorities of a proportionate, non-discriminatory share of operating engineers work. Without the employers therefore, "there could be no assurance that a mandatory remedial level of hours and wages could ever result." (PA. 205).

tioners conceded that such a remedy was necessary by including minority-hours goals in their own proposed injunctive decrees (PA. 223).[66]

Second, the District Court found it necessary to include the employers in the Decree so that they could hire minorities unaffiliated with Local 542 if the Union failed or was unable to refer them sufficient numbers of minority operating engineers (PA. 221-222). Paragraph 27 of the Decree authorizes direct minority hiring under those circumstances (PA. 241-242). Petitioners GBCA, CAEP, UCA and Glasgow themselves urged this provision on the District Court claiming that it was necessary "in order to assure equal employment among operating engineers."[67]

Third, the District Court was mindful of the industry-wide exemption which the associations had secured for their members and all other employers from the Philadelphia Plan's coverage. It was also aware that the training and upgrading commitments which the associations had made in their Affirmative Action Program with Local 542 had been breached. Inclusion of the associations and the employers in the Decree restores the *status quo ante* by imposing on petitioners the obligations they should have been under since 1968.

Fourth, the District Court knew from extensive and unrebutted testimony that operating engineers traditionally learn their trade through on-the-job training (*e.g.*, JA.

66. Paragraph 12 of the Decree ultimately represented the District Court's own choice of the appropriate minority-hours goals required of the employers (PA. 234-235). Those goals were set according to the percentage of minorities residing in the population in each of Local 542's five districts. The goals themselves were "conservative" since the actual percentage of minorities available for operating engineers work in the labor force was higher (PA. 52, 99 n. 31, 224). In addition, the goals were "phased in so as to avoid undue disruption to employers and non-minority operating engineers." (PA. 225). Only in the last two years of the Decree will minorities receive an amount of work equal to their percentage in the population (PA. 221, 235).

67. Response of Defendant Contractor Associations and Contractor to Plaintiffs' Proposed Order, at 4 (Docket #782, JA. 35).

279). The District Court also found that: (1) the inevitable consequence of racial discrimination in hours was a denial of on-the-job training to minorities (PA. 114, 222, 247) and (2) that the breach of the associations' and Union's upgrading responsibilities under their Affirmative Action Program also acted as a deterrent to the development of skills by minorities (PA. 40 n. 15, 247). For these reasons, the court ordered on-the-job training for minorities to remedy these violations (¶¶ 24, 41, 42, at PA. 240, 247).

Finally, each of the employers was subject to a collective bargaining agreement with Local 542 that uniformly established the Union as its exclusive referral agent. The District Court found it necessary to reform the agreement in order to remedy the discrimination inflicted upon minorities. The only way that reformation could be effective was to include all parties to the agreement and order them to comply with the provisions of the Decree.

B. The Court's Equitable Powe Authorized the Allocation of Remedial Costs Among All the Named Defendants

The associations and Glasgow complain that the District Court did not have the power to order them to pay costs because the sole basis for their liability was vicarious. This argument is totally without merit. The most common remedy against principals held liable vicariously is an award of damages (*see* cases cited in Section I E 2, *supra*). The District Court's power to impose remedial costs, a much less drastic remedy, would appear undeniable. The District Court's opinion accompanying its order allocating the costs of the injunction fully canvasses the caselaw directly on point. *See* 507 F. Supp. 1146, 1152-1156 (E. D. Pa. 1980),[68] We do add one observation. This Court has frequently held that a state may be required to pay the costs for implementing a decree occasioned by its agents' constitutional or statutory violations even when the state

68. Reprinted in the Appendix accompanying the Petition for Certiorari in No. 81-280, at 194-225.

was immune from suit by virtue of the Eleventh Amendment. *E.g., Quern v. Jordan, supra; Milliken v. Bradley, (II),* 433 U. S. 267 (1977); *Edelman v. Jordan,* 415 U. S. 651 (1974). The District Court's power to impose a portion of the costs of compliance on the employers and associations in this case follows *a fortiori.*

The decision on how to allocate costs among defendants is vested in the sound discretion of the District Court. *Milliken II, supra,* 433 U. S. 288-290. The court exercised that discretion here by allocating costs according to the relative culpability of the defendants. The largest portions were assessed against Local 542 (40%) and the JATC (25%) because they had practiced intentional discrimination. The three association defendants were ordered to pay 10% each because they were "willing parties" to the Union's successful scheme to evade the Philadelphia Plan. The employer defendant was ordered to pay 5% because its liability was vicarious. Although other methods of allocation would have also been permissible, this was not an abuse of discretion.[69]

Post Decree Order #10 anticipates that the portion of costs assessed against the associations and Glasgow will be shared by the members of the defendant class. The District Court decided that, instead of directly assessing contributions from the defendant class, efficiency and the need for prompt implementation required that the named defendants pay "up front" and then file an action for contribution against the defendant class members. The collection mechanism chosen by the District Court was not an abuse of discretion. Since no contribution action has been filed by the named defendants, questions incident to that matter are premature for resolution.

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69. The total cost of implementation to date has been about $200,000, of which petitioners' share (35%) is $70,000. This figure verges on the insignificant when the size of this industry is considered. Within the last reported six-month period, the employers in the defendant class paid more than $30 million in wages to operating engineers (Addendum B, Exh. 1, at 7a *infra*).

C. The All Writs Act Authorized the Inclusion of the Employers and Associations in the Injunctive Decree

Apart from its equitable power, the All Writs Act authorized the District Court to include the employers and the associations in its injunctive Decree.[70] That Act, originally passed by Congress as part of § 14 of the 1789 Judiciary Act, and now codified at 28 U. S. C. § 1651(a), provides federal courts with all the procedural writs, including the writ of injunction, *FTC v. Dean Foods Co.*, 384 U. S. 597, 604 (1966), "necessary or appropriate in aid of their respective jurisdictions."[71] *See generally United States v. New York Telephone Co.*, 434 U. S. 159, 171-174 (1977), *Harris v. Nelson*, 394 U. S. 286, 299 (1969), *Adams v. United States*, 317 U. S. 269, 272-274 (1942).

The Act, though not a grant of plenary power, is intended to assist the federal courts in the performance of their duties. *Harris v. Nelson, supra*, 394 U. S. at 299. It has been relied upon to support the inclusion in an injunction of non-parties and non-wrongdoers who "are in a position to frustrate the implementation of a court order or the proper administration of justice . . . and encompasses even those who have not taken any affirmative ac-

70. The District Court did not rely on the All Writs Act to support the issuance of its injunction or its order allocating the costs for its implementation. The Court of Appeals requested briefing on whether the Act authorized the inclusion of the employers and associations in the Decree, but did not, in light of its equally-divided affirmance, address the issue. It is settled, though, that the prevailing party may raise on appeal any ground in support of a judgment, "whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U. S. 471, 475 n. 6 (1970). *See also United States v. American Railway Express Co.*, 265 U. S. 425, 435 (1924).

71. The Act provides in full:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

tion to hinder justice." *New York Telephone Co., supra,* 434 U. S. at 174.

The use of the All Writs Act has been particularly necessary in civil rights cases. There it has provided a source for courts to enjoin parties and non-parties who interfered, or were in a position to interfere, with remedial decrees. *Bullock v. United States,* 265 F. 2d 683, 690-691 (6th Cir.), *cert. denied,* 360 U. S. 909 (1959) (non-parties); *Faubus v. United States,* 254 F. 2d 797 (8th Cir. 1958) (parties). *See Griffin v. County School Board of Prince Edward County,* 377 U. S. 218, 233-234 (1964). In a more recent case, following the Court's decision in *New York Telephone Co.,* the All Writs Act was used to join an additional defendant so that complete relief could be provided to a victim of civil rights violations. *DuShank v. Conlisk,* 583 F. 2d 965, 967 (7th Cir. 1978).

"The basis for [relying on the All Writs Act] against a third party is not culpability, but practical necessity." *Pittsburgh-Des Moines Steel v. United Steelworkers,* 633 F. 2d 302, 307 (3d Cir. 1980). Necessity required the inclusion of the employers and the associations in the District Court's injunctive Decree. As emphasized earlier (Section II A, *supra*), the employers and associations were needed because the Court reformed their labor contract with Local 542, set minority-utilization goals on the employers, authorized direct hiring of minorities and mandated training programs to remedy the associations' failure to comply with their Affirmative Action Program commitments.

The District Court was duty-bound to prevent the continuation of intentional racial discrimination against minorities. *Albemarle Paper Co. v. Moody, supra,* 422 U. S. at 421. It correctly concluded that the employers and associations were indispensable parties in the framework of relief necessary to achieve that goal. The All Writs Act independently supported their inclusion in the court's injunction.

III. The Defendant Class Was Properly Certified

Litigation against a class of defendants has a long history, both in England and in this country.[72] Equity Rule 48, issued in 1845 (1 How. lvi), authorized defendant

72. *See, e.g.*, Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630 (1978); Z. Chafee, SOME PROBLEMS OF EQUITY, 198-242 (1950) (hereafter "Chafee").

In the United States, defendant classes have been certified in a wide variety of litigation settings, including, for example:

(a) *Civil Rights. See, e.g., Lee v. Washington*, 390 U. S. 333 (1968), *aff'g.*, 263 F. Supp. 327 (M. D. Ala. 1966); *Redhail v. Zablocki*, 418 F. Supp. 1061 (E. D. Wisc. 1976), *aff'd. on other grounds*, 434 U. S. 374 (1978); *Marcera v. Chinlund*, 595 F. 2d 1231 (2d Cir.), *vacated on other grounds*, 442 U. S. 915 (1979); *Callahan v. Wallace*, 466 F. 2d 59 (5th Cir. 1972); *Gibbs v. Titelman*, 369 F. Supp. 38 (E. D. Pa. 1973), *rev'd. on other grounds*, 502 F. 2d 1107 (3d Cir.), *cert. denied*, 419 U. S. 1039 (1974); *United States v. Trucking Employers, Inc.*, 13 [BNA] FEP Cases 384, 72 F. R. D. 101 (D. D. C. 1976), 75 F. R. D. 682 (D. D. C. 1977); *Thompson v. Bd. of Educ. of Romeo Schools*, 12 [BNA] FEP Cases 1700 (W. D. Mich. 1976).

(b) *Anti-trust. See, e.g., Management Television Systems, Inc. v. National Football League*, 52 F. R. D. 162 (E. D. Pa. 1971); *Research Corp. v. Pfister Associated Growers, Inc.*, 301 F. Supp. 497 (N. D. Ill. 1969).

(c) *Corporate and stockholders suits. See, e.g., Appleton Electric Co. v. Advance-United Expressways*, 494 F. 2d 126 (7th Cir. 1974); *Dudley v. Southeastern Factor & Finance Corp.*, 57 F. R. D. 177 (N. D. Ga. 1972).

(d) *Patent. See, e.g., Dale Electronics, Inc. v. R. C. L. Electronics, Inc.*, 53 F. R. D. 531 (D. N. H. 1971), 356 F. Supp. 1117 (D. N. H. 1973).

(e) *Environmental litigation. See, e.g., Northern National Gas Co. v. Grounds*, 292 F. Supp. 619 (D. Kansas 1968), *aff'd. in part, rev'd. in part on other grounds*, 441 F. 2d 704 (10th Cir.), *cert. denied*, 404 U. S. 951 (1971).

(f) *Indian land conversion. See, e.g., Oneida Indian Nation of Wisconsin v. State of New York*, 85 F. R. D. 701 (N. D. N. Y. 1980); *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899 (D. Mass. 1977).

as well as plaintiff class actions; and in 1853 this Court affirmed a money judgment against a defendant class. *Smith v. Swormstedt,* 57 U. S. 288. When the Equity Rules were amended in 1912, Equity Rule 38 was issued (226 U. S. 659) allowing defendant and plaintiff class actions; and this rule was enforced in *Supreme Tribe of Ben-Hur v. Cauble,* 255 U. S. 356 (1921). The original version of Rule 23 of the Federal Rules of Civil Procedure, effective in 1938 (308 U. S. 689), authorized defendant and plaintiff class actions, *see Hansberry v. Lee,* 311 U. S. 32 (1940); and the present version of Rule 23, resulting from the 1966 amendment, makes clear from its opening words that defendant and plaintiff class actions are authorized ("One or more members of a class *may sue or be sued* as representative parties on behalf of all . . .") (emphasis added).

Shortly after amended Rule 23 went into effect, a suit was brought challenging Alabama's statewide practice of racial segregation in prisons. A three-judge district court certified a Rule 23(b)(2) defendant class of all wardens of state, county and local prisons, held that racial segregation in the prisons was unconstitutional, and enjoined all members of the defendant class from engaging in such segregation. *Washington v. Lee,* 263 F. Supp. 327 (M. D. Ala. 1966).[73] On direct appeal, this Court affirmed on the merits and held that:

> The State's contention that Rule 23 of the Federal Rules of Civil Procedure, which relates to class actions, was violated in this case . . . [is] without merit.

Lee v. Washington, supra, 390 U. S. at 333. *See also Hadnott v. Amos,* 394 U. S. 358 (1968) (defendant class of probate judges; class certified at 295 F. Supp. 1003, 1005 (M. D. Ala. 1968)).

This brief history of defendant class actions refutes the implication of petitioners United and Bechtel that the defendant class certification and order in this case was novel. We now proceed to their more specific contentions.

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73. The District Court's Order against the members of the defendant class appears at 263 F. Supp. at 333-334.

A. The Commonality and Typicality Requirements Were Satisfied

Rule 23(a)(2) and (3) provide that a defendant class action may be maintained only when "there are questions of law or fact common to the class" and "the . . . defenses of the representative parties are typical of the . . . defenses of the class."

In this case, the District Court found that the commonality and typicality requirements were met because the issues relating to the named and class defendants were identical (PA. 202):

> [T]he issues of fact and of law are precisely the same for all employers at this liability stage. With respect to the per se theory of liability adopted herein, there is likewise no individualized defense.

United and Bechtel dispute this finding by asserting that there are individual issues determinative of each employer's liability, such as whether that employer had knowledge of the Union's discrimination, and whether that employer had a substantial percentage of minority operating engineers. This argument is circular: it assumes that such individualized questions are dispositive of liability and then posits that those questions predominate. A defendant cannot control a plaintiff's theory of liability; and under plaintiffs' theory, which formed the basis of the class certification adopted by the District Court in its decision on liability, those individualized questions are irrelevant.

As the District Court held, only two facts were necessary to establish the liability of each member of the defendant class: (1) that an employer chose Local 542 as its exclusive hiring agent (a fact not disputed by any defendant class member and which defines membership in the class); and (2) that Local 542 practiced intentional discrimination (also not disputed here) (PA. 202). The issue of liability, which is the same for Glasgow and every member of the defendant class, is whether an employer is injunctively liable under § 1981 upon proof of those facts.

B. The Adequacy Requirement Was Satisfied

Rule 23(a)(4)'s requirement of adequacy of representation has two components: the class representative's counsel is competent and there is no antagonism between the representative and the class members on the merits of the lawsuit. *See, e.g., Wetzel v. Liberty Mutual Ins. Co.*, 508 F. 2d 239, 247 (3d Cir.), *cert. denied*, 421 U. S. 1011 (1975). As for the first component, the District Court found that the competence of Glasgow's counsel "cannot seriously be questioned" (PA. 200), and this finding has not been challenged. As for the second, no antagonism is present here. Glasgow has precisely the same interests (and has pursued them) in defending against its own § 1981 liability as does United, Bechtel or any other employer. By vigorously defending against its own liability, Glasgow was defending against the liability of each identically-situated employer (PA. 201):

> Defendant Glasgow had absolutely nothing to gain by defending the action poorly since that could create liability in itself, even if liability were broadly distributed. And so long as the terms by which liability would be imposed are exactly the same as the terms upon which any other defendant employers might be held liable, there is sufficient assurance that the named defendant will represent defendant class members appropriately.

In short, Glasgow, one of the largest employers of operating engineers, did not "lie down before [the plaintiffs'] projected attack."[74] By vigorously protecting its own interests, Glasgow adequately protected the interests of the class.[75]

C. Certification Under Rule 23(b)(2) Was Appropriate

Following this Court's decision in *Lee v. Washington, supra*, a great many defendant classes were certified under

74. Chafee, *supra* at 238.

75. *See, e.g., Marcera v. Chinlund, supra*, 595 F. 2d at 1239; *United States v. Trucking Employers, Inc., supra*, 72 F. R. D. at 106.

Rule 23(b)(2).[76] Contrary to arguments by petitioners United and Bechtel, there are no linguistic problems precluding defendant class actions under (b)(2).[77]

Lee v. Washington was decided by this Court only two years after Rule 23 became effective. Surely, if (b)(2) had not contemplated defendant class actions, that would have been known to the Court in *Lee*. One might also expect that if subdivision (b)(2) had authorized only plaintiff class actions, this would be explicit on the face of the Rule or at least mentioned by the drafters of the Rule. But Rule 23(b)(2) does not distinguish between plaintiff and defendant classes; it refers to "the party opposing the class," not "the defendant," as it could have been phrased if only plaintiff classes were anticipated. And the Advisory Committee's Note on Rule 23(b)(2) suggests no distinction between plaintiff and defendant class actions. 39 F. R. D. at 102. To the contrary, the Note specifically states, without reservation, that civil rights cases are particularly appropriate for (b)(2) treatment. *Ibid.*

The purpose of (b)(2) is to allow homogeneous class actions, in which violations of law turning on identical questions of law and fact can be adjudicated in a unitary proceeding, and in which injunctive relief can issue to remedy those violations. *See, e.g., Wetzel v. Liberty Mutual Ins. Co., supra,* 508 F. 2d at 248-253. As the District Court stated (PA. 205):

> [W]here the litigable issues are identical or nearly so, the efficacy of proceeding by a defendant class action logically outweighs the arguments favoring multiple individual suits and fits snugly within the overall scheme of 23(b)(2). Where such identity occurs there is no greater reason to deny *res judicata* application against defendants than against plaintiffs.

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76. *See, e.g.,* the civil rights cases cited in note 72, *supra.*

77. *See Paxman v. Campbell,* 612 F. 2d 848, 854 (4th Cir. 1980), *cert. denied,* 101 S. Ct. 951 (1981). *Contra Marcera v. Chinlund, supra,* 595 F. 2d at 1238.

In many cases, if a defendant class cannot be certified under (b)(2), it could not be maintained at all.[78] There is no right to opt out of a (b)(2) suit; all class members, because of the cohesiveness of the issues litigated, are bound by the resulting judgment, *Sosna v. Iowa*, 419 U. S. 393, 403 (1975). The usual alternative for certification—Rule 23(b)(3)—requires that class members must be notified of the litigation and permitted to opt out if they choose. Certainly defendant class certification under (b)(3) would not be effective for, as Professor Chafee observed, "[a]n invitation to be a defendant is not tempting."[79]

For the reasons stated above, homogenous civil rights defendant class actions are generally appropriate under Rule 23(b)(2). There are, however, two narrower grounds available for upholding the defendant class certification in this particular case.

First, whatever interpretive problems (b)(2) may present in other defendant class actions, even the most restrictive construction of the Rule authorizes a defendant class here. Rule 23(b)(2) applies when "the party opposing the class has acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Here, as Judge Higginbotham found, each plaintiff not only acted, but was forced to act, with respect to the entire defendant class of employers "in one and only one way" (PA. 203)—he was required, if he chose to work as an operating engineer for *any* employer, to apply with a union that practiced intentional racial discrimina-

78. That problem is not presented in this particular case, however, because (b)(1) certification is also appropriate. *See* pp. 65-66, *infra*.

79. *Chafee, supra*, at 260. *See also Guy v. Abdulla*, 57 F. R. D. 14, 17 (N. D. Ohio 1972) ("[o]bviously, a defendant class whose members could remove themselves would not be very meaningful"); 1 H. Newberg, Class Actions, § 1148, at 256 (1977).

tion. This in turn made appropriate final injunctive relief with respect to the class as a whole.[80]

Second, as the District Court noted (PA. 202), plaintiffs moved for class certification pursuant to Rule 23(b)(1), as well as (b)(2). Believing that (b)(2) certification was appropriate, the District Court did not rule on the applicability of (b)(1). But, in light of the District Court's findings, defendant class certification is clearly appropriate under both subdivisions of (b)(1).

Subdivision (A) of Rule 23(b)(1) authorizes a defendant class action here because separate actions against individual employers would create the risk of varying adjudications that would establish incompatible standards of conduct for the plaintiffs. If the hiring system were modified in one manner in a lawsuit against one employer, but modified in a different manner (or not modified at all) in a suit against another employer, plaintiffs would be subjected to incompatible standards for obtaining work in a system where they "cannot regulate [or] foresee those employers to whom they may be referred." (PA. 206). By "provid[ing] a ready and fair means for achieving unitary adjudication" in an action "against a class"[81] of employers, this is a prototypical 23(b)(1)(A) action.[82]

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80. Indeed, the Fourth Circuit, which endorsed such a restrictive construction, stated that in the case under consideration the defendant class members "were free to adopt maternity leave policies of entirely unknown differences or similarities. It is uncontradicted that there was no statewide policy in force, centrally directed or otherwise." *Paxman v. Campbell, supra,* 612 F. 2d at 854 n. 9. Here, there was a known, executed and uniform collective bargaining agreement that not only compelled *all* plaintiffs to apply with Local 542 for jobs, but also compelled *all* employers to rely exclusively on the Union for their workers. There was thus a centrally-directed policy at work which, in practice, effectuated classwide intentional discrimination.

81. Advisory Committee Note on Rule 23(b)(1)(A), 39 F. R. D. at 100.

82. *See, e.g., Dale Electronics, Inc. v. R. C. C. Electronics, Inc.,* 53 F. R. D. 531 (D. N. H. 1971); *Federal Savings & Loan Ins. Corp. v. Huttner,* 265 F. Supp. 40 (N. D. Ill. 1967).

Subdivision (B) of Rule 23(b)(1) also authorizes a defendant class action here. Given "the reality of a uniform hiring hall system" (PA. 141), an adjudication against one employer, resulting in a modification of the system, would as a practical matter have a dispositive practical effect on the interests of other employers in maintaining the hiring system for which they bargained. Indeed, Rule 23(b)(1)(B) was designed for class actions where class members "have interests in a common organization, fund, or contract",[83] which is precisely the situation here.[84]

D. The District Court Had Personal Jurisdiction Over the Members of the Defendant Class

Petitioners United and Bechtel contend that the District Court lacked personal jurisdiction over them since, as unnamed members of the defendant class, they were not served with the complaint or a summons. The District Court rejected that argument (PA. 211-212), and no valid reason has been advanced here to warrant a contrary result.

American courts have never required service of the complaint and summons on unnamed members of a defendant class. It has been deemed sufficient from the earliest cases, *Smith v. Swormstedt, supra,* that if the named representative was properly served and adequately represented the class, then personal jurisdiction attached to all class members. *See also, Lee v. Washington, supra; Hansberry v. Lee, supra; Supreme Tribe of Ben-Hur v. Cauble, supra.* "The class action thus stands as the out-

83. *Kekich v. Travelers Indemnity Co.*, 64 F. R. D. 660, 667 (W. D. Pa. 1974); *see* Advisory Committee Note on Rule 23 (b)(1)(B), 39 F. R. D. at 100-102.

84. *See also, e.g., Oneida Indian Nation of Wisconsin v. State of New York, supra; Lynch Corp. v. MII Liquidating Co.*, 82 F. R. D. 478 (D. S. D. 1979); *Stewart v. Waller*, 404 F. Supp. 206 (N. D. Miss. 1975); *Research Corp. v. Pfister Associated Growers, Inc., supra*, 301 F. Supp. at 500; *Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc.*, 285 F. Supp. 714 (N. D. Ill. 1968); *United States v. Cantrell*, 307 F. Supp. 259 (E. D. La. 1969).

standing exception to the general rule that one is not bound by a judgment *in personam* in litigation to which he/she has not been made a party by service of process." [85]

English courts have reached a similar result.[86] And commentators who have analyzed the issue have likewise rejected the requirement of serving each class member as inconsistent with the purposes served by the class action device. Chafee, *supra*, at 231: "[F]ormal service of process is out of the question; that would defeat the chief advantage of a class suit." [87]

Since Rule 23 does not require service on unnamed class members, petitioners' argument amounts to a challenge to Rule 23's constitutionality.[88] Such a challenge is untenable. In a defendant class action, particularly one such as this in which identical issues are litigated against the named and class defendants, due process is satisfied when, as here, the named defendant's representation of the class is adequate. *Hansberry v. Lee*, *supra*, 311 U. S. at 42-43; *see Larionoff v. United States*, 533 F. 2d 1167, 1184-1187 (D. C. Cir. 1976), *aff'd. on other grounds*, 431 U. S. 864 (1977). This is even more so in this case since, two years before the trial began, notice of the pendency of the action was transmitted by certified mail to each member of the defendant class (PA. 16, 212, JA. 121-123).[89]

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85. Chief Judge Bryant in *United States v. Trucking Employers, Inc.*, *supra*, 13 FEP Cases at 384. *See also P. A. R. C. v. Commonwealth of Pennsylvania*, 343 F. Supp. 249, 291-292 (E. D. Pa. 1972); *Management Television Systems, Inc. v. National Football League*, *supra*, 52 F. R. D. at 164-165.

86. Chafee, *supra*, at 203-208 (discussing cases).

87. *See also* Note, *Defendant Class Actions*, *supra*, 91 Harv. L. Rev. at 638: ". . . defendant class actions would generally be impossible if courts had to obtain personal jurisdiction over every class member, instead of just the named defendant, in order to bind the entire class."

88. No provision of the Rules of Civil Procedure has ever been held unconstitutional.

89. Notice was not required since the defendant class was certified under Rule 23(b)(2). Classes certified under that provision,

United and Bechtel received that notice, but chose not to intervene (PA. 16 n. 2). They waited on the sidelines, and then, after the 18 month trial was complete, they began filing motions and briefs with the court on issues affecting the merits and the class status of the suit.[90] They now contend, citing inapposite patent cases, that the District Court's liability opinion can only have *res judicata* effect on them. (Brief of United, at 32-34).[91]

This argument, of course, is another way of saying that plaintiffs must file and serve 1,487 new complaints on the members of the defendant class, or file and serve

89. (Cont'd.)

and under (b)(1), are homogeneous; class members are therefore not permitted to opt out of the litigation since, by definition, there are no individual questions to resolve. *Sosna v. Iowa*, 419 U. S. 393, 397 n. 4, 403 (1975), *Eisen v. Carlisle & Jacquelin*, 417 U. S. 156, 177 n. 14 (1974).

90. Neither United nor Bechtel ever moved to intervene, not even for the limited purpose of filing an appeal to the Third Circuit or their Petitions for Certiorari here. Despite their entry of "special appearances", their active involvement in this litigation since 1977—including, but not limited to, motions to recertify the plaintiff class (Docket #687, JA. 30), their demand for a jury trial (Docket #717, JA. 33), their motion to decertify the defendant class (Docket #778-779, JA. 34), their response and briefs on the form of the injunctive remedy (Docket #780-781, JA. 34), and their appeals to the Third Circuit and this Court—confers party status on them. *Adams v. Morton*, 581 F. 2d 1314 (9th Cir. 1978); *Bolden v. Pennsylvania State Police*, 578 F. 2d 912 (3d Cir. 1978). Treating them as named parties would overcome any problems implicit in their having appealed the Decree without having moved to intervene for that limited purpose.

91. The Court's power to enter injunctive relief against defendant class members presupposes that there is no dispositive individualized defense assertable by any class member. In patent cases, a declaratory judgment as to validity can be entered, but an injunction against infringement cannot issue on a classwide basis because whether a class member infringed the patent is a peculiarly individualized question. *See* cases cited in United's Brief (No. 81-330) at 32. In this case, on the other hand, there is no individualized defense available to injunctive liability.

a new complaint naming 1,487 parties as defendants, in order to obtain the injunctive relief which the District Court found them entitled to and ordered in 1979. And plaintiffs would be required to undertake such unmanageable and financially prohibitive litigation even though every relevant issue of fact and law was resolved in the class suit. Such a result would effectively nullify all the purposes for having class actions at all. *United States Parole Commission v. Geraghty*, 445 U. S. 388, 402-403 (1980) (favoring unitary proceedings over multiple lawsuits, fostering reductions in costs and fees, and protecting defendants and plaintiffs from inconsistent adjudications and obligations). For that reason, it has been the rule from the beginning that in a properly certified defendant class action (as in a properly certified plaintiff class action), relief can be awarded for or against each class member without joining it as a party and serving it with process. *Accord, Smith v. Swormstedt* (money judgment against all members of a defendant class) and *Lee v. Washington* (injunction against all members of a defendant class).[92]

92. No case, based on our research, has held to the contrary. United's reliance on *Christoper v. Brusselback*, 302 U. S. 500 (1938) is misplaced. *Christopher* arose out of two separate proceedings. The first suit, *Gage v. Brusselback*, 85 F. 2d 617 (7th Cir. 1936), had been brought in an Illinois federal court by creditors of an insolvent Federal Stock Land Bank against the Illinois stockholders of the bank. *Gage was not brought or certified as a defendant class action;* however, the court entered a decree which purportedly bound stockholders wherever they were located. *Christopher* was then commenced in Ohio against the bank's Ohio stockholders. In their complaint, the plaintiffs pled the Illinois judgment as conclusive against the Ohio stockholders.

This Court held that the Illinois judgment could not be pled as a bar against the Ohio defendants. In so holding, the Court observed that Equity Rule 38, the precursor to Rule 23, did not serve to enlarge the jurisdiction of the federal courts. But that ruling was only necessary because the *Christopher* plaintiffs had asserted the applicability of Equity Rule 38 for the first time in their Reply Brief filed in this Court. *See* Reply Brief of Respondent-Creditors, at 16-17. They asserted in that brief that Equity Rule 38 conferred

CONCLUSION

For the reasons stated, the judgment should be affirmed.

Respectfully submitted,

ROBERT J. REINSTEIN
Klein Hall
1719 North Broad Street
Philadelphia, Pennsylvania
19122

HAROLD I. GOODMAN
GERMAINE INGRAM
JONATHAN M. STEIN
Community Legal Services, Inc.
Sylvania House
Juniper and Locust Streets
Philadelphia, Pennsylvania
19107

Counsel for Individually Named and Class Respondents

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92. (Cont'd.)
jurisdiction on the Illinois court to bind the Ohio defendants. Since *Gage* had not been brought pursuant to Rule 38, the Court's holding was hardly surprising. However, the Court did emphasize, in language relevant here: "[Rule 38] . . . preserved unimpaired the jurisdiction of federal courts to render a decree binding upon absent defendants affecting their interest in property within the jurisdiction of the court." 302 U. S. at 505, citing with approval, *Smith v. Swormstedt.*

ADDENDA

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-2698

COMMONWEALTH OF PENNSYLVANIA, *et al.*

v.

LOCAL UNION 542, *et al.*

POST DECREE ORDER #35

(Filed Apr. 6, 1981)

AND NOW, TO WIT, this 6th day of April, 1981, pursuant to argument in open court on March 31, 1981, IT IS ORDERED that the motion of United Engineers & Constructors, Inc., and Bechtel Power Corporation to decertify the defendant-class prior to Stage II is hereby *granted,* with the defendant-class decertified for purposes of Stage II of this litigation *only.* The Court's Memorandum Opinion will be filed in due course.

/s/ LOUIS C. BECHTLE
Louis C. Bechtle, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-2698

COMMONWEALTH OF PENNSYLVANIA and
RAYMOND WILLIAMS, et al.

v.

LOCAL 542, INTERNATIONAL UNION OF
OPERATING ENGINEERS, et al.

MASTER'S FIRST YEAR REPORT ANALYSIS

The monthly report for August reports the year to date hours of employment of all operating engineers and the year to date minority hours of employment. The second quarterly report [4(a)] reports the quarterly hours and wages as well as the year to date hours and the wages for six months (two quarters beginning March, 1981) of all operators and minority operators. Exhibit #1 attached is a recapitulation of the numerical statistics from that report. The Reporting Committee also reports that there were 634 contractors who filed reports as required, but 230 contractors who reported hours and wages to the Pension and Welfare System but who did not file reports as required by the Judgment and Decree and Post Decree Orders of the Court. The percentage of contractors complying with the goal of the Judgment and Decree must be adjusted when it is ultimately learned what percentages those non-reporters met during the first year. (See Exhibit #2). A further analysis of those non-reporting companies indicates that, with a few exceptions, they are basically small operators with few hours and low wage numbers to such an extent that the percentage goals of each district in hours and wages would not be so adversely affected as to result in non-compliance within the industry. More detailed treatment of this subject follows later in this report.

The reports show that, with one exception, and with the caveat that the final figures could be impacted by those who did not report, the industry met the quotas of hours and wages required by the Court. The exception is that in no district did 50% of all contractor-employers meet the hours percentage imposed by the Court. And, indeed, the percentage of contractor-employers who met the wages quota falls off in each district as follows:

	% Contractor Employers	*% Contractor-Employers Meeting Wage Quotas*
District #1	45.7%	42.8%
District #2	48.2%	42.2%
District #3	42.4%	32.1%
District 4#	40.7%	34.3%
District 5#	44.1%	35.9%

The significance of these statistics is that compliance within the industry is being accomplished by many less than 50% of the contractor-employers. There are contractor-employers who should comply but rely upon the 50% requirement as a relief valve; that is, that so long as the industry complies and 50% comply, the Court's Orders would not require more from them. It is, therefore, the recommendation of the Master, in view of the non-compliance within the industry that:

1. That *all* contractor-employers be required to comply with the second year quotas as to hours and wages unless a satisfactory reason is given to the Master and the Court for non-compliance (such as one or two man operation, or retaining long-time employees, etc.)

2. That if a contractor-employer does not comply with hour and wage quota within one month, he shall be so informed and be required to explain such non-compliance to the Master or comply within the next month.

3. If such contractor-employer does not so explain or comply within the next month resulting in two months of non-compliance then he shall be notified that contempt of court proceedings will commence against him.

Exhibit #2a recaps the number of contractor-employers, within ranges of hours of operator employment, who did and did not meet the 12% hour quota requirement. It is obvious from this report that those with the fewest hours are less likely to comply and require close scrutiny. The recommendation that the Court require 100% compliance or logical explanation of non-compliance will enable the Master and Reporting Committee to lessen abuse within the industry.

Non-Reporting Contractor-Employers

Attached to this Master's Report on the first year of enforcement of injunctive relief under the Judgment and Decree are two lists of contractor-employers who have not filed the required reports. List "A" (Exhibit 3) includes those who reported less than 300 hours of operator employment and List "B" (Exhibit 4) includes those who reported more than 300 hours in the time period January 1 to August 31, 1981. These two lists total the 230 contractor-employers not reporting as stated earlier herein.

Some of these may be excused because they were never notified of this litigation, either because they were not on the list to whom the notice packages were sent, or are new in the region, or are out of business, or some other still undisclosed reason. However, there are many; certainly the majority, who have ignored the notice package, special contact by the Master, by mail on February 25, 1981, and by personal contact at various times during the first year. It is the Master's recommendation that those without logical and legitimate excuse must be disciplined since they have ignored the Court and possibly so affected the first year report as to make compliance difficult to determine.

Upon further investigation into the reports of these companies of hours actually worked by operating engineers out of Local 542 the following analysis appears:

1. 127 contractors had less than 300 hours of operator employment and 103 had more.

2. The total hours of those reporting more than 300 hours to the Pension and Welfare System is approximately 197,000.

3. Adding all 197,000 hours to the total hours in district #1 (see Chart #1) and assuming none were minority hours reduces the percentage of minority hours to 14%, less than the 15.06% reported but still more than the 12% required. Obviously, also, all 197,000 hours were not in District #1 and, in all likelihood were spread proportionately over the five districts. The above assumption that all were non-minority hours is likewise probably inaccurate.

It is the Master's recommendation that these non-reporting contractor-employers be pursued for explanation and, failing same, for proceedings before the Court. Their failure to report has at least two adverse effects on implementation of the injunctive relief. One, accurate calculation of percentages is impossible and two, other contractor-employers may be encouraged to ignore the Court mandate.

Hence, the Master recommends that those on List A and B who had not, in the past, appeared on mailing lists used for circulating the notice packages, be sent the notice package with a special warning regarding reporting. For those who have received the notice package and subsequent communications, the Master recommends one warning with instructions to file monthly reports for September 1980 to August 1981 and to file monthly reports as are currently required. Failure to comply with this warning would result in proceedings before the Master and ultimately, the Court for contempt and appropriate punishment.

The Reporting Procedure

The Master commends the Reporting Committee and John Smith, a member of the Advisory Committee who worked with the Reporting Committee, for a fine record keeping procedure for the first year. Through trial and error and communication with counsel, the Master, and the parties, refinement of the report forms and procedures were necessary and resulted in an accurate system. The method of record gathering and keeping is described in the final attachment hereto marked "The Reporting Committee". (Exhibit 5)

The Master recommends that the present system be continued with closer follow up on non-reporters and those found to be out of compliance, for one reason or another, with appropriate curative measures.

The Master has recommended some changes in previous Post Decree Orders and some additional mandates from the Court. Upon approval of this report, the Master will submit appropriate suggested Orders for implementation.

/s/ Frank W. Jenkins
Frank W. Jenkins, Master

Copy: To all counsel

Dist.	% Goal	# of Contractors Filing Reports	# of Contractors Meeting Goal	% of Contractors Meeting Goal	Total Hrs. For Year	Total Min. Hrs. for Year	% of Min. Hrs. for Year	Total Wages 6 mos.— Mar.-Aug.	Total Min. Wages 6 mos.	% of Min. Wages 6 mos.	% Contractors Complying w/Wage Quota
#1	12.0%	304	139	45.72%	2,779,551	418,626	15.06%	19,701,921	2,830,126	14.36%	42.8%
#2	1.1%	85	41	48.24%	488,359	16,961	3.47%	3,039,292	101,196	3.3%	42.2%
#3	0.5%	73	31	42.47%	416,722	10,338	2.48%	3,103,218	59,810	1.9%	32.1%
#4	2.0%	86	35	40.70%	316,103	15,506	4.91%	2,0[illegible],348	95,032	4.5%	34.3%
#5	8.0%	77	34	44.16%	404,510	46,898	11.59%	2,598,499	252,196	9.7%	35.9%

EXHIBIT #1

[Other Exhibits Not Printed]

Respondent's Brief

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Nos. 81-280, 81-330, 81-331, 81-332, 81-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC., *et al.*,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS

KENNETH I. JONSON
(Counsel of Record)

DOUGLAS C. HERBERT
STEPTOE & JOHNSON CHARTERED
1250 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 862-2258

Attorneys for Respondent Local 542, International Union of Operating Engineers

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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GENERAL BUILDING CONTRACTORS ASSOCIATION, INC., *et al.*,
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COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENT LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS [1]

STATEMENT OF THE CASE

I. THE COMPLAINT AND CLASS CERTIFICATION

The named plaintiffs in this case are twelve black men and the Commonwealth of Pennsylvania. The individual

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[1] Local 542 is a party respondent in this Court because it was one of the "parties to the proceeding in the court whose judgment is sought to be reviewed," as provided in Rule 19.6. The briefs filed in this Court by the petitioners themselves expressly recite that Local 542 was a party to the proceeding below. *See, e.g.*, Brief of Petitioner General Building Contractors Association, Inc., No. 81-280, at ii; Brief of Petitioner United Engineers & Constructors Inc., No. 81-330, at ii; Brief of Petitioners Contractors Association of Eastern Pennsylvania and United Contractors Association, No. 81-331, at ii; Brief of Petitioner Glasgow, Inc., No. 81-332, at ii; Brief of Petitioner Bechtel Power Corporation, No. 81-333, at ii.

Local 542, along with all of the petitioners in these cases, was one of the defendants found injunctively liable by the district court below in Commonwealth of Pennsylvania, *et al.* v. Local 542, International Union of Operating Engineers, *et al.*, No. 71-2698 (E.D. Pa.). Local 542 filed an appeal from the district court's judgment

plaintiffs brought the action for themselves and on behalf of a class of minorities who were or wished to become operating engineers.[2] (PA 14.)[3] The complaint

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in the Court of Appeals for the Third Circuit (C.A. No. 80-2159), as did all of the petitioners in these cases (C.A. Nos. 80-2073, 80-2074, 80-2161, 80-2162, 80-2163). Although each appeal was assigned a separate docket number by the Third Circuit, all of the appeals were consolidated for purposes of briefing and argument. Upon conclusion of the consolidated proceeding, however, the court of appeals issued two separate judgments, one resolving the appeal filed by Local 542 (C.A. No. 80-2159) and the other resolving the appeals filed by the petitioners. (C.A. Nos. 81-2073, 80-2074, 80-2161, 80-2162, 80-2163). Local 542 was named in the caption of the judgment entered in the appeals of the petitioners now before this Court.

Two prior constructions by the Court of now-superseded Rule 21.4, 398 U.S. 1009 (1970)—the operative language of which is identical to current Rule 19.6—support the conclusion that Local 542 is a party in this Court. In O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 783 n.14 (1980), HEW was permitted to file under Rule 21.4 even though it was not party to the order of the court of appeals being reviewed on certiorari, and the order entered on HEW's appeal was not before the Supreme Court. In General Telephone Co. v. EEOC, 446 U.S. 318, 322 n.4 (1980), a union named in the caption of a court of appeals judgment was permitted to participate pursuant to Rule 21.4 even though it had neither filed a notice of appeal in the court below nor participated in briefing or argument in that court.

While Local 542 believes that it is entitled to file as a party pursuant to Rule 19.6, it recognizes that its status as a party is not entirely free from doubt, because of the entry of separate judgments by the court of appeals. Accordingly, as a protective measure, Local 542 is simultaneously filing an alternative motion pursuant to Rule 36.3 for leave to file its brief on the merits as *amicus curiae*. The brief itself conforms to the page limitation applicable to an *amicus* brief. Therefore, even if Local 542 is deemed not to be a party, there will be no prejudice to the petitioners if this brief is accepted for filing as an *amicus* brief.

[2] Operating engineers run heavy machinery used in building construction and highway work.

[3] References to "PA" are citations to the Appendix to the Petitions for Certiorari filed in Nos. 81-330, 81-331, 81-332, and 81-333. References to "GBCA App." are citations to the Appendix to the

alleged an array of discriminatory employment practices in the construction industry in eastern Pennsylvania and Delaware.[4] Named as defendants were (1) Local 542 of the International Union of Operating Engineers ("Local 542"); (2) the Joint Apprenticeship and Training Committee ("JATC"), an organization jointly administered by Local 542 and the contractors that is responsible for training new operating engineers; (3) Glasgow, Inc., which was sued in its own right as a contractor within the jurisdiction of Local 542 and as a representative of a class of contractors who had been parties to a collective bargaining agreement with Local 542 and who had hired operating engineers affiliated with Local 542; and (4) four contractor trade associations that had entered into collective bargaining agreements with Local 542. (PA 14-15.) The trade associations were named as defendants both because their membership was composed of contractors who employ operating engineers pursuant to collective bargaining agreements with Local 542 and because they had negotiated and signed collective bargaining agreements with Local 542 on behalf of their members. (PA 200.) The district court certified the

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Petition for Certiorari filed in No. 81-280. References to "JA" are citations to the Joint Appendix filed in Nos. 81-280, 81-330, 81-331, 81-332, and 81-333.

[4] The plaintiffs' claims of discrimination were based on 42 U.S.C. § 1981 (1976); 42 U.S.C. § 1983 (Supp. III 1979); 42 U.S.C. § 1985(3) (Supp. III 1979); Civil Rights Act of 1964, Title VI, 42 U.S.C. §§ 2000d—2000d-6 (1976 & Supp. III 1979); Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e—2000e-17 (1976 & Supp. III 1979); Labor Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185 (1976); Pennsylvania Human Relations Act, Pa. Stat. Ann. tit. 43, §§ 951-960 (Purdon 1964 & 1965-1978, 1979, 1980 & 1981 Supps.); U.S. Const. amend. XIII; and U.S. Const. amend. XIV. (JA 96-98.) The plaintiffs did not press their Title VII claim against the defendant contractor class, however, because the contractors had not been named in the administrative Title VII charge filed with the EEOC in 1968.

requested plaintiff and defendant classes. (PA 15-17, 144-150, 199 n.64.)

II. THE EMPLOYMENT PROCESS

Local 542 represents operators of heavy construction and highway equipment, within Delaware and eastern Pennsylvania. The estimated 1,400 contractors in the defendant class all have entered into collective bargaining agreements with Local 542 during the time period relevant to this case. (PA 29.) The terms of the agreements have been agreed upon during labor negotiations between Local 542 and the contractor trade associations. (PA 29.) The agreements so negotiated have served as the standard Local 542 collective bargaining agreement and have been entered into by both members and nonmembers of the contractor associations. (PA 30; JA 325.) The employment scheme established by the standard collective bargaining agreement is a joint enterprise that confers reciprocal powers and responsibilities upon both Local 542 and the contractors within the context of an exclusive hiring hall system.

The agreement provides that Local 542 is responsible for maintaining a list of out-of-work operating engineers placed into four categories ("priority groups") based on the number of hours of recent construction experience. (PA 24-26.) Local 542 must locate and refer skilled operators within twenty-four hours in response to requests or else contractors may hire outside the hiring hall. Operators are to be referred from the highest possible priority list. Referrals are given to operating engineers on the list who have been out of work for the longest period of time, unless the job requires special skills that persons with older out-of-work dates do not have. (PA 25-26; Pl. Exs. P-216 & P-217(a); JA 245, 258; R. 481-482, 7708.)

Contractors also have several powers and responsibilities under the agreement. They may reject referrals of

unqualified persons,[5] and may "recall" particular operating engineers for ninety days after termination of employment, without regard to the out-of-work date of the employee. (PA 26 n.5; Pl. Exs. P-216 & P-217(a); JA 245, 258-59; R. 481-482, 7708.) Additionally, the contractors have the right to determine which engineers will be laid off.[6] The contractors and Local 542 also jointly operate the JATC, which is responsible for the selection and training of operating engineer apprentices. Persons selected as apprentices automatically become members of the union and are placed on a special out-of-work list for referral purposes. (PA 121.) Finally, the contractors have express power to supervise the referral activities entrusted to Local 542 under the collective bargaining agreement, by enforcing the provisions governing the hiring hall and—since at least 1971—proscribing discrimination in the hiring hall system. (PA 192 & n.61.)

III. THE DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The district court bifurcated the litigation, setting the classwide liability issues for trial at Stage I but reserving until Stage II questions concerning (a) the specific relief to be awarded individual plaintiffs and (b) the assessment and allocation of individual liability for such

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[5] (PA 26.) The collective bargaining agreement provides, "The employer shall have the right to determine the competency and qualifications of men referred by the Union, and the right to hire or not to hire." (Pl. Exs. P-215, P-216, P-217(a); JA 231, 242, 256; R. 481-482, 7708; *see* JA 309-310.)

[6] The collective bargaining agreement places no restrictions on the right of employers to choose which employees to lay off, except that an employee in a higher priority group may not be laid off before an employee in a lower priority group, "unless in the opinion of the contractor, the operator in the lower group has certain skills that the operator in the higher group does not possess." (Pl. Ex. P-216; JA 245-246; R. 481-482.)

monetary relief among the named and class defendants. (JA 132-33.) At the conclusion of the Stage I classwide proceedings, the district court issued an opinion finding Local 542 and the JATC liable for intentionally discriminating against minorities, in violation of 42 U.S.C. § 1981 (1976) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2000e-17 (1976 & Supp. III 1979).

The district court also held that Glasgow, Inc., the contractor trade associations, and the defendant contractor class were injunctively liable to the plaintiff class under 42 U.S.C. § 1981.[7] The injunctive liability of the contractor interests was predicated upon "their contractual relationship and their use of a hiring hall system which in practice effectuated intentional discrimination." (PA 168.)

IV. SUBSEQUENT PROCEEDINGS IN THE TRIAL COURT

After release of the liability opinion and further briefing by the parties, the district court issued its Stage I injunctive Decree and Judgment. The Decree established minority membership and referral quotas for Local 542 and minority hours quotas for the defendant contractor class. (PA 221-222; JA 391-392, 396-401.) All of the defendants were ordered to provide special training to minorities. (PA 222; JA 395, 405-406.)

The costs associated with the implementation of the Decree have been imposed upon all of the defendants held injunctively liable. Local 542 and the JATC were assessed 65% of these costs. (PA 285.) Glasgow, Inc. and the contractor trade associations were ordered to pay

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[7] The district court held that the class as a whole had not violated 42 U.S.C. § 1985(3) (Supp. III 1979). (PA 198.) The district court did not rule upon any of the plaintiffs' claims based on other statutes. (PA 133 n.43.) *See* note 4 *supra*.

35% of these costs, with a right to obtain contribution from unnamed members of the defendant class. (GBCA App. 213-216.) The percentage allocations were based on the trial court's assessment of the relative degree of responsibility of the various defendants. (GBCA App. 210-212.)

In subsequent proceedings, the district court decertified the defendant class for purposes of Stage II and considered questions pertaining to individual relief and attorneys' fees. None of these issues yet has been the subject of appeal and none is before this Court.

V. PROCEEDING IN THE COURT OF APPEALS

All named defendants and two unnamed members of the defendant contractor class filed timely appeals from the liability and injunctive relief holdings. These appeals were consolidated. The court of appeals affirmed without opinion the district court's judgment against all defendants, issuing separate judgments affirming the injunctive liability of Local 542 and the JATC and affirming the injunctive liability of the defendant contractors. The contractor appellants petitioned this Court for writs of certiorari, which were granted on October 19, 1981; Local 542 and the JATC did not seek review in this Court.

SUMMARY OF ARGUMENT

Local 542 fully supports the plaintiffs in their position that the district court was correct in holding that the defendant contractors are liable under 42 U.S.C. § 1981. Local 542 and the defendant contractor associations collectively bargained the labor agreement that establishes the hiring hall as the principal mechanism for the hiring of operating engineers. Under the labor agreement, they and each member of the defendant contractor class—all of whom are parties to the agreement—participated in a joint enterprise to govern employment prac-

tices in the operating engineer trade. As a consequence, each of them is liable for the intentional discrimination found to have been perpetrated through that mechanism. Under the circumstances of this case, therefore, the district court's finding of liability against the contractor interests is fully justified.

Even if this Court were to conclude that the liability theory adopted below is improper, the petitioners are wrong in asserting that they are entitled to a remand with instructions that judgment be entered in their favor. The most that is properly at stake here is whether the joint employment enterprise, featuring the delegation of hiring functions to Local 542, is sufficient to justify the imposition of vicarious liability on the contractors as a class for Local 542's intentional discrimination. Even if this Court answers that question in the negative, the individual petitioners are not entitled to the entry of judgment in their favor. Rather, the case should be remanded to the district court for consideration of the question whether the contractors were themselves directly responsible for discrimination. Neither the plaintiffs nor Local 542 should be deprived of an opportunity to litigate this question—which has not previously been considered—if this Court rejects the classwide vicarious liability theory adopted by the courts below.

ARGUMENT

I. THE LOWER COURTS PROPERLY FOUND THE PETITIONERS LIABLE UNDER 42 U.S.C. § 1981

The district court found that the contractors' contractual relationship with and use of the hiring hall system "in practice effectuated intentional discrimination." (PA 168.) The contractors attack this holding with repeated assertions that they simply signed a collective bargaining agreement that gave *carte blanche* to Local 542 to devise and administer all employment practices affecting the

plaintiff class. Accordingly, the petitioners argue, they had nothing to do with the discrimination found to have followed and cannot be held liable for it.

In the first place, that argument proves too much for the petitioners. For the reasons advanced by the plaintiffs, the petitioners cannot evade the thrust of section 1981 merely by delegating all employment functions to someone else. Moreover, the petitioners' argument ignores significant attributes of the joint enterprise created by the collective bargaining agreement that they negotiated and signed.

It is true that the district court found that not all of the contractors viewed as a class had engaged in intentional discrimination. That holding should not, however, obscure the cooperative nature of the employment process that governed the industry. The collective bargaining agreement did not require the contractors to keep hands off the employment process. They collectively delegated power to Local 542 that was found to have been exercised in an intentionally discriminatory manner by the union. They collectively retained the potential to lay a restraining hand on the hiring hall intentional discrimination, both by supervising the union and by taking corrective measures themselves, and they collectively failed to do so. Taken together, these actions and inactions render injunctive liability appropriate for all named defendants and the defendant class.

II. EVEN IF THIS COURT REVERSES THE LIABILITY OF THE CLASS OF DEFENDANT CONTRACTORS AND ASSOCIATIONS, INDIVIDUAL MEMBERS OF THE DEFENDANT CLASS ARE NOT ENTITLED TO A JUDGMENT IN THEIR FAVOR

Three of the petitioners not only request that this Court reverse the judgment of the court of appeals, but also seek a remand with directions that judgment be

entered in favor of the defendant contractors and associations.[8] Petitioners overreach in making this request.

A. The Question Whether Individual Members of the Defendant Class Violated Section 1981 by Acting with Discriminatory Intent Has Not Been Ruled upon by the District Court

The plain fact is that the district court expressly refused to adjudicate the actions of individual members of the defendant class,[9] for two reasons. First, under the district court's vicarious liability theory, findings as to the contractors' individual actions and motivations were wholly irrelevant. Proof of intentional discrimination in the operation of the overall hiring hall system was sufficient to hold members of the defendant contractor class injunctively liable for violation of a nondelegable duty not to discriminate. Second, under the district court's bifurcation order, only classwide issues have been tried. Individual issues were reserved for subsequent proceedings.[10]

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[8] *See* Brief of Glasgow, Inc. at 36; Brief of Contractors Association of Eastern Pennsylvania and United Contractors Association at 38. Petitioners Bechtel Power Corporation and United Engineers & Constructors Inc. request that the judgment of the district court be vacated insofar as it applies to them and the other members of the defendant class. *See* Brief of United Engineers & Constructors Inc. at 39; Brief at Bechtel Power Corp. at 42.

[9] The district court carefully noted that its conclusions of no discriminatory intent were limited to the class when viewed as a single entity. *See* PA 168 ("plaintiffs have failed to prove on a preponderance of the evidence that the associations or contractors *viewed simply as a class* were actually aware of the union discrimination") (emphasis added); *id.* ("not *all* contractors and associations may be said as a class to have had reasonable notice of the union's discrimination") (emphasis original); *id.* at 195 ("plaintiffs have failed to show intent to discriminate by the employers *as a class*, and indeed have been unable to show knowledge or notice of discrimination by that *class as a whole*") (emphasis added).

[10] (*See* PA 196 (evidence relevant to monetary liability of individual members of the defendant contractor class "quite properly has

B. The Record Below Suggests That Many Contractors Engaged in Intentionally Discriminatory Acts

There are two primary areas where the district court found that the exclusive hiring hall system operated in an intentionally discriminatory manner—(a) the hours worked and wages earned by minority members and affiliates of Local 542 and (b) the entry of minorities into the membership of Local 542. (PA 50-60, 118-120.) In both of these areas, the record already suggests that many of the contractors actively participated in the acts found by the district court to have been discriminatory.

1. *Discrimination in Hours and Wages*

The district court's inference of intentional discrimination against minorities with respect to the number of hours they worked and the wages they received was based in large part upon the existence of statistical disparities between the average hours worked and wages received by minority and non-minority members of Local 542. (PA 57-60, 66-67, 111-118.) Significantly, the average disparity in wages between minorities and non-minorities was greatest among workers who did not go through the hiring hall, but who instead worked steadily for a single employer.[11] Responsibility for disparities in the wages

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not been presented at Stage I")). The district court applied the same principle to the named contractor and association defendants:

> While substantial evidence has been presented which plaintiffs assert demonstrates intentional discrimination or discrimination in impact by Glasgow, most of this evidence would be more appropriate in the damages stage of this litigation at which time Glasgow's practices could be evaluated together with the practices of other employers. Thus, I refuse to treat Glasgow separately from the other parties to the contract. Likewise, I will not treat the associations separately.

(PA 132.)

[11] The plaintiffs' statistical expert ran separate analyses for "permanent" employees who work steadily for a single employer without going through the Local 542 hiring hall within a year and

of these "permanent" employees must of course be attributed primarily if not exclusively to their long-term employers, not the union.[12]

2. *Discrimination in Entry*

The district court's finding of intentional discrimination with regard to the entry of minorities into the membership and affiliation of Local 542 was also based on statistical evidence demonstrating disparities in the rates at which minorities were able to utilize certain methods of entry or affiliation. (PA 53-57, 67-72.) As with hours and wages discrimination, the record shows that the contractors played an active role in the creation of the statistical disparities from which discriminatory intent was inferred. In fact, the contractors are directly implicated in the three methods of entry into the union found by the district court to have been most heavily weighted against minorities (PA 68-72):

—*Organization* of previously non-unionized contractors, where the past hiring practices of the employer largely dictate the racial composition of those entering the union. (R. 530-531.)

—*Admission of C Branch members*, who enter the so-called C Branch of the union automatically after being

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for operating engineers who did not have a steady job and thus received one or more referrals in a year. (R. 433-438, 440-444; Pl. Ex. P-168, Report No. 7, pp. 26-34; R. 481-482.)

[12] (R. 532-533, 542-547.) Individual contractors influence hours and wages through the assignment of employees to the higher-paying pieces of equipment and to overtime work, and through determining who is laid off and recalled. *See* pp. 4-5 *supra*. In fact, there are several instances recounted even in Stage I testimony by individual plaintiffs where employers assigned minority operating engineers to less desirable and lower-paying equipment or improperly laid off minorities in order to employ non-minorities. (PA 74, 76, 77-79, 91, 92, 127-132.)

hired directly (without use of the hiring hall) by C Branch contractors.[13] (R. 281.)

—*Direct entry* following waiver of the usual requirements, which the evidence at trial suggested was attributable at least in part to pressure from individual contractors. (*E.g.*, R. 2686-2690, 2742, 2977-2978, 2980.)

In the event of a reversal of the vicarious liability of the defendant class, the respondents are entitled to an adjudication in the district court concerning the actions of individual members of the defendant class. Certainly, there is no basis in the present record for the entry of judgment in favor of the petitioners—with its potential *res judicata* effect upon individual class members.

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[13] Contractors who employ operating engineers for yard and shop work sign a separate "C Branch" collective bargaining agreement. C Branch contractors recruit and hire their own employees, without use of union referrals. (PA 27; JA 401.) Under this agreement, the C Branch contractors control who becomes a member of the C Branch of Local 542. A person becomes a member of Local 542's C Branch through being hired and completing a probationary period with a C Branch contractor. (*See, e.g.*, Pl. Exs. P-456, P-458; R. 5020.)

CONCLUSION

The judgment of the court of appeals should be affirmed. Alternatively, if the judgment of the court of appeals is reversed, the case should be remanded to the district court for further proceedings with respect to the liability of the contractor and association defendants.[14]

Respectfully submitted,

KENNETH I. JONSON
(Counsel of Record)

DOUGLAS C. HERBERT
STEPTOE & JOHNSON CHARTERED
1250 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 862-2258

Attorneys for Respondent
Local 542, International
Union of Operating Engineers

January 1982

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[14] In the event of a remand, the district court would have to consider in the first instance the extent to which the case could proceed as a defendant class action and if so, the appropriate class definition. Whether the action were to proceed with a class more narrowly defined, or through the joinder of a number of individual contractors as additional named defendants, the statute of limitations has been tolled by the pendency of the current defendant class action. *See* Appleton Electric Co. v. Graves Truck Line, Inc., 635 F.2d 603, 609-10 (7th Cir. 1980), *cert. denied*, 101 S.Ct. 2058 (1981); *cf.* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554-55 (1974) (plaintiff class action).

Petitioner's Reply Brief

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No. 81-280

IN THE

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OCTOBER TERM, 1981

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY TO BRIEF OF RESPONDENT COMMONWEALTH OF PENNSYLVANIA

JOHN G. KESTER *
JOHN J. BUCKLEY, JR.
Hill Building
Washington, D.C. 20006
(202) 331-3069
Attorneys for Petitioner

Of Counsel:
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-280

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY TO BRIEF OF RESPONDENT COMMONWEALTH OF PENNSYLVANIA

Citing "the recent trend toward liberalized standing," and arguing that "recent decisions have further expanded the category of injuries which support suits by a state in its capacity as parens patriae," Pennsylvania asks this Court to recognize standing where no case of this Court ever has before. Comm. Br. at 47 (footnote omitted).[1] It urges that "considerations of public policy

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[1] Citations to "Comm. Br." refer to the Brief of Respondent Commonwealth of Pennsylvania, those to "Pet. Br." to Petitioner's opening brief, and those to "A." to the Appendix to the petition for certiorari. This reply brief addresses only the Commonwealth's brief and the issue of standing, which is unique to the Commonwealth. Petitioner has filed a separate reply brief responding to the briefs of the other Respondents and *amici curiae*.

mandate that states be permitted to bring *parens patriae* suits to enforce federal civil rights laws." *Id.* at 48 (footnote omitted).

It is true, as the Commonwealth says, *id.* at 50, that "at least one circuit and numerous district courts" have permitted suits like the one it brought here. What the Commonwealth's brief fails to point out is that the "one circuit" is the Third Circuit, from which the present case arises, and that circuit is alone; and that the "numerous district courts" cited consist totally of the Eastern and Western Districts of Pennsylvania.

The fact is that the Pennsylvania attorney general's office and the Third Circuit have held a view of standing different from this Court's. *Cf., e.g., Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 50 U.S.L. Week 4103 (U.S. Jan. 12, 1982), *reversing* 619 F.2d 252 (3d Cir. 1980); *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976) (denying motion for leave to file bill of complaint); *Pennsylvania* v. *Porter*, 659 F.2d 306, 325-339 (3d Cir. 1981) (Garth, J., concurring in part and dissenting in part), *pet'n for cert. filed*, No. 81-465.[2]

In 1971, in a case relied on by the Commonwealth, the Third Circuit announced that "§ 1981 may not be frustrated by the development of overly technical judicial doctrines of standing . . . ."[3] *Hackett* v. *McGuire Bros., Inc.*, 445 F.2d 442, 446-447 (3d Cir. 1971). In the ensuing decade there followed an epidemic of *parens patriae*

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[2] "Courts in this circuit have long recognized that the Commonwealth may bring a parens patriae action in the United States District Courts to enforce the fourteenth amendment." *Pennsylvania* v. *Porter*, *supra*, 659 F.2d at 317.

[3] Compare the reference in the district court's opinion below, in another context, to what it called an "overly technical view of standing." A. 123.

suits brought in federal district courts of the Third Circuit by the Pennsylvania attorney general's office.[4] On the occasions it tried to advance its *parens patriae* theory outside the Third Circuit, the Commonwealth was held to have no standing. *Pennsylvania* v. *New Jersey*, *supra*; *Pennsylvanuia* v. *Kleppe*, 533 F.2d 668 (D.C. Cir.), *cert. denied sub nom. Pennsylvania* v. *Kobelinski*, 429 U.S. 977 (1976).

The Commonwealth has not shown that § 1981 contemplates its suing. It cannot do so. Nothing in the legislative history suggests that § 1981 gave a cause of action on behalf of States. On the contrary, the Congress contemplated that suits likely would be *against* States, or State officials. See Pet. Br. 37-39.[5]

To meet the Article III and prudential requirements of federal jurisdiction, a State even if it invokes *parens patriae* must also show a "distinct and palpable injury."

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[4] See, *e.g.*, *Pennsylvania* v. *Porter*, *supra*; *Jordan* v. *School District*, 548 F.2d 117 (3d Cir. 1977); *Pennsylvania* v. *O'Neill*, 431 F.Supp. 700 (E.D.Pa. 1977), *aff'd*, 573 F.2d 1301 (3d Cir. 1978); *Pennsylvania* v. *Flaherty*, 404 F.Supp. 1022 (W.D.Pa. 1975); *Pennsylvnaia* v. *Glickman*, 370 F.Supp. 724 (W.D.Pa. 1974); *Pennsylvania* v. *Rizzo*, 8 E.P.D. ¶ 9681 (E.D.Pa. 1974); *Pennsylvania* v. *Sebastian*, 368 F.Supp. 854 (W.D.Pa. 1972), *aff'd*, 480 F.2d 917 (3d Cir. 1973).

[5] As to statutory jurisdiction, the Commonwealth now says that even if it failed to meet the standard of 28 U.S.C. § 1343(3) or § 1343(4), see Pet. Br. 47-48, nevertheless jurisdiction can be founded on 28 U.S.C. § 1331, the general federal-question provision. Comm. Br. 41 n.34. The difficulty with that argument is that unless 42 U.S.C. § 1981 included Pennsylvania in its protected class, there is no basis on which the Commonwealth can raise a federal question in its own right. A plaintiff's interest must "at least be 'arguably within the zone of interests to be protected or regulated' by the statutory framework." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979), *quoting Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 n.19 (1976), *and Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970); *see also Warth* v. *Seldin*, 422 U.S. 490, 498-501 (1975).

Watt v. *Energy Action Educ. Foundation*, 102 S.Ct. 205, 212 (1981); *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). Pennsylvania here cites a *pot pourri* of generalized and speculative concerns, but no interest that begins to meet the standards to sue in federal court. Supposed effect on "mental attitudes of all the people of the Commonwealth," Comm. Br. at 46, is not enough. The Pennsylvania attorney general's oath of office does not add anything, either. *Cf.* Comm. Br. at 45 n.41.

True, States have been allowed to sue as *parens patriae* to prevent a threat to their entire economy, *e.g.*, *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), or to protect the health of their citizenry when threatened by outside pollution, *e.g.*, *Missouri* v. *Illinois*, 180 U.S. 208 (1901). In doing so they enforce a quasi-sovereign interest distinct from that of individual citizens. *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 663 (1923).[6]

But from that it does not follow that § 1981 and Article III confer standing on a State to join a class action on behalf of a defined group of minority workers—particularly where, as here, the individual plaintiffs have been abundantly able to sue without the State's participation.[7] The present case is not one where a State might argue that there was no other effective plaintiff. *Cf.* *Maryland* v. *Louisiana*, 451 U.S. 725, 739 (1981). Indeed, the Commonwealth's principal role in this case appears to have been to add to the time and expense of the courts and all the parties. The district court found that

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[6] *Puerto Rico* v. *Alfred L. Snapp & Sons*, 632 F.2d 365 (4th Cir. 1980), *cert. granted*, No. 80-1305, and *Puerto Rico* v. *Brankamp*, 654 F.2d 212 (2d Cir. 1981), *pet'n for cert. filed*, No. 81-361, whether or not they were correctly decided, are different from the present case because they involved broad economic questions affecting the status of Puerto Ricans under federal law.

[7] *Parens patriae* originated in the king's acting as guardian for persons unable to help themselves. See *Hawaii* v. *Standard Oil Co.*, *supra*, 405 U.S. at 257.

"it is patently clear that the participation of the Commonwealth as a party plaintiff was purely cosmetic," and that "the function of the Commonwealth attorneys was to sit back and observe during the proceedings connected with this case." [8]

Pennsylvania also argues that it should be allowed to sue as a proprietor because it along with others helped partially fund two job-training programs for 122 and 56 unemployed, some of them black, and because the Union although it accepted the programs' graduates did not keep promises as to advanced seniority it allegedly had made. See Comm. Br. 43; A. 26-28. (The district court found that "none of the associations or contractors were parties to the agreement or responsible for" the programs. A. 26, 28.) The Commonwealth argues that it should have standing "to secure to minority graduates of the . . . programs the benefits and opportunities that were envisioned when the Commonwealth funded the programs." Comm. Br. at 43 (emphasis supplied).

This speculative theory of standing has no precedent and, worse, no limit. It is indistinguishable from, if not broader than, *parens patriae*—it would permit States to enter federal courts whenever it was speculated that alleged violations might interfere with the hoped-for success of a state educational or social program. "The alleged damage to the State as a private owner is merely a makeweight . . . ." *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). Moreover, the speculative

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[8] *Pennsylvania* v. *Local Union 542*, Civ. No. 71-2698, E.D.Pa. Memorandum and Order of January 6, 1982, at 57, 58-59 (copy on file with the Clerk). This Court has recognized that *parens patriae* standing is inappropriate when, as here, the action can easily be brought by those directly injured. *Oklahoma* v. *Atchison, T. & S.F. Ry.*, 220 U.S. 277, 289 (1911). "The arguments in favor of allowing such standing become less compelling, as it becomes more feasible to achieve complete relief through suits by the parties actually aggrieved." *Pennsylvania* v. *Kleppe*, *supra*, 533 F.2d at 675 n.42.

injury described is many steps removed from the Union hiring-hall discrimination that was the asserted basis for holding Petitioner liable in this case. It could not give standing to sue this Petitioner. *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, *supra*, 426 U.S. at 41-42; *cf. Sierra Club* v. *Morton*, 405 U.S. 727 (1972). See also *Pennsylvania* v. *Porter*, *supra*, 659 F.2d at 332-34 (Garth, J., dissenting).

Pennsylvania's motives may be the highest. But its means, using the federal courts, are misplaced. "[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, *supra*, 50 U.S.L. Week at 4109; *accord*, *Warth* v. *Seldin*, 422 U.S. 490 (1975).[9]

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[9] The Commonwealth's brief also suggests, at 42, that this Court need not address the question of Pennsylvania's standing because the standing of other plaintiffs was not challenged. This is not, however, a case in which the standing of one of many parties was academic. *Cf. Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, *supra*, 429 U.S. at 264 n.9. For here the Commonwealth was awarded relief in its own right and seeks further such relief. The district court initially authorized Pennsylvania to receive attorneys' fees, J.A. 409, and a demand for $93,125.31 was filed, J.A. 412. That claim recently was disallowed, Memorandum and Order of January 6, 1982, *supra*; but the order may be appealed. Further, the Commonwealth has emphasized that it "takes the position that it should be entitled to present evidence in the Stage II proceedings on the issue of the award of compensatory damages to the Commonwealth." J.A. 337. It is demanding punitive damages also. Memoranum of Commonwealth of Pennsylvania on Stage II Damages, district court, Aug. 28, 1981, at 3. Both the threat of damages, and the litigation expense of having to defend against such a claim, make the standing of the Commonwealth of more than academic concern, as does its history of unrestrained resort to the federal courts. (Indeed, still another civil rights *parens patriae* case brought in the name of the Commonwealth is currently before this Court on petition for certiorari. *Pennsylvania* v. *Porter*, *supra*, No. 81-465.)

CONCLUSION

For the reasons stated here and in our opening brief, the judgment should be reversed.

Respectfully submitted,

JOHN G. KESTER
JOHN J. BUCKLEY, JR.
Hill Building
Washington, D.C. 20006
Attorneys for Petitioner

Of Counsel:
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

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Petitioner's Reply Brief

2

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No. 81-280

IN THE

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY TO BRIEFS OF INDIVIDUAL AND CLASS RESPONDENTS, NAACP, LOCAL 542, ET AL.

JOHN G. KESTER *
JOHN J. BUCKLEY, JR.
Hill Building
Washington, D.C. 20006
(202) 331-3069
Attorneys for Petitioner

Of Counsel:
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY TO BRIEFS OF INDIVIDUAL AND CLASS RESPONDENTS, NAACP, LOCAL 542, ET AL.

As in the lower courts, the briefs of Respondents and of *amici curiae* supporting them (the NAACP,[1] the Union, and others) focus almost entirely on theories for holding the *employers* strictly liable for the Union's discrimination. Petitioner GBCA and other non-employer *trade associations* are seldom mentioned.

Respondents' position is succinctly stated in the NAACP's brief:

> "The court below did not find that the employers had criminally or civilly conspired but rather that as a class, those relying upon the hiring hall must be held liable for the union's discriminatory hiring prac-

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[1] The NAACP signed the original complaint, J.A. 106, but appears in this Court as *amicus curiae*.

tices." Brief for National Association for the Advancement of Colored People, *Amicus Curiae* at 2.[2] From that they "urge this court to affirm the liability of [all] petitioners on the theory of 'vicarious' or strict liability," *id.* at 3, and even though as a non-employer, Petitioner GBCA did not "rely" on the hiring hall in any way.

Much of this Petitioner's opening brief remains unanswered. Respondents choose not to discuss the legislative history of the statute on which they rely, 42 U.S.C. § 1981. Nor do they appear to see any limit on the reach of liability under *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968).[3] They simply assert, over and over, the existence of a strict-liability duty to prevent racial discrimination by others of which one had neither knowledge nor even notice. And in urging considerations of legislative policy, they ignore the fact that after full play of the political process the Congress made its own judgment of the proper scope of liability when it enacted Title VII of the Civil Rights Act of 1964.[4]

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[2] Hereinafter cited as "NAACP Br." The Brief of Respondent Commonwealth of Pennsylvania is cited as "Comm. Br.;" that for Individual and Class Respondents as "I. & C. Br.;" that for Local 542 as "Local 542 Br.;" Petitioner GBCA's opening brief as "Pet. Br." References to "A." are to the Appendix to Petition for Certiorari in No. 81-280, and to "J.A." to the Joint Appendix. A separate brief has been filed in reply to the brief of Respondent Commonwealth of Pennsylvania.

[3] They argue that "Congress could have but did not impose limits on the duties created by the statute." Comm. Br. 22. *But see City of Memphis* v. *Greene*, 451 U.S. 100 (1981); *Runyon* v. *McCrary*, 427 U.S. 160, 167 (1976); *id.* at 187-89 (Powell, J., concurring); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968); Pet. Br. 34.

[4] Although Title VII did not preempt 42 U.S.C. § 1981, *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975), one might well conclude that Title VII should be viewed as at least a brake on extending § 1981 to wholly new concepts of liability. *Cf. Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 101 S.Ct. 2615, 2626-27 (1981).

I. ISSUES RESPONDENTS FAIL TO ADDRESS

A. Legislative History of § 1981

Like other enactments of the period, § 1981 "cannot be understood in a historical vacuum." *City of Newport* v. *Fact Concerts, Inc.*, 101 S.Ct. 2748, 2755 (1981). Yet although their entire case depends on the meaning of § 1981, none of the Respondents addresses its legislative history as related to this case at all.[5]

B. Causation

Still unaddressed in any of the Respondents' briefs is the anomaly of holding GBCA liable for discrimination it in no way caused. To hold it liable simply for signing as agent what the district court found was a valid, non-discriminatory collective bargaining agreement, A. 19, J.A. 382, is like holding an automobile dealer's salesman liable for acts of a purchaser who later drives in violation of the traffic laws.

This Court has unanimously recognized that even where the person charged allegedly acted wrongfully, liability cannot be based on an act which was too far removed from the injury. *Martinez* v. *California*, 444 U.S. 277, 285 (1980) ("appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law.") Even to meet jurisdictional requirements, there must be an injury that "fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the

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[5] *Amicus* Black Economic Survival devotes three pages to the subject, but quotes only generalities. Brief at 14-16.

In referring to § 1981 as the 1866 Act, Respondents also ignore that § 1981 is § 1977 of the Revised Statutes of 1874, which stated that it codified § 16 of the Enforcement Act of 1870, a Fourteenth-Amendment measure. See *Johnson* v. *Railway Express Agency, Inc.*, *supra*, 421 U.S. at 459; Pet. Br. 15-18, 18a. Even if (as is doubtful) the 1866 provision went beyond that of 1870 in any relevant aspect, this Court has rejected "the flawed premise that Congress did not intend to change the meaning of existing laws when it revised the statutes in 1874." *Maine* v. *Thiboutot*, 448 U.S. 1, 8 n.5 (1980).

court." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). "[T]he complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions." [6] *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977).

C. What Basis for Vicarious Liability?

Respondents *assert* that "the doctrine of vicarious liability is part and parcel of § 1981." I. & C. Br. 17. If that is so, it is odd that it was never mentioned when the 1866 and 1870 Acts were debated, and that the 1866 bill's author said the law would apply only to the person intentionally violating it. See Pet. Br. 21-22. It also is odd that even a limited vicarious liability was overwhelmingly rejected by the Congress only five years later. See Pet. Br. 22-24; *City of Newport* v. *Fact Concerts, Inc., supra*, 101 S.Ct. at 2758-59; *Monell* v. *Department of Social Services*, 436 U.S. 658, 692-93 n.57 (1978).

Respondents say that vicarious liability was "deeply embedded in the common law." I. & C. Br. 17; *but cf. City of Newport, supra*, 101 S.Ct. at 2760. They cite as authority *Story on Agency*. I. & C. Br. 39. The short answer is that, of course *agency* law existed in the nineteenth century. But this is not a master-servant or even an agency case. The Union was not the servant or agent of GBCA. See Pet. Br. 27-28; pp. 11-13, *infra*. Vicarious liability did not exist as a ubiquitous floating concept in the individualistic latter-nineteenth century. It was applied only where specific requirements were met, as in master-servant cases.[7] The post-Civil-War Congresses, un-

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[6] Respondents told the Court of Appeals:

> "As Judge Higginbotham found, and plaintiffs proved, the hiring hall has never operated according to the contractually established rules. To the contrary, departures and not compliance, have been the norm." Brief of Individually Named and Class Appellees, U.S. Court of Appeals, p. 23 n.46.

[7] Mr. Justice Story would not have held GBCA liable. The treatise Respondents cite states:

less they specified or implied otherwise, did not intend to abrogate ordinary common-law limitations on tort liability. *City of Newport* v. *Fact Concerts, Inc, supra*, 101 S.Ct. at 2755; *cf. Owen* v. *City of Independence*, 445 U.S. 622, 638 (1980). Respondents cite nothing from that era to tie a vicarious-liability clause onto § 1981, and are left once more simply asserting that the law means what they want it to mean.[8]

II. RESPONDENTS' THEORIES

Respondents mingle other theories to try to sustain the judgment against GBCA, but none fits this case.

"But the liability by virtue of the principle of relation of master and servant, must cease, where the relation itself ceases to exist; and no other person than the master of such servant can be liable . . . . Consequently a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable; and to make such person liable, recourse must be had to a different and more extended principle, namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit. That, however, is too large a position, as Lord Chief Justice Eyre says, in the case of Bush *v.* Steinman, and cannot be maintained to its full extent, without overturning some decisions, and producing consequences which would, as Lord Tenterden observes, 'shock the common sense of all men' . . . .

* * *

"[T]he principal is never liable for the unauthorized, the wilful, or the malicious act or trespass of his agent." J. STORY, AGENCY §§ 453*b*, 456 (3d ed. 1846).

[8] Although Respondents now claim to expound "settled legal concepts," I. & C. Br. at 46, the district court believed that its holding was unprecedented, A. 142, and Respondents themselves earlier announced that "this case has accomplished a fundamental restructuring of the entire operating engineers craft in this part of the country" and that "the requirement of counsel to prevail ultimately on these complex and novel factual and legal issues . . . makes this case unique . . . ." Plaintiffs' Brief in Support of Their Motion for an Award of Counsel Fees and Costs (Docket No. 863) at 23, 39; see J.A. 43.

A. Non-Delegable Duty Theory

Respondents argue that whatever duty is imposed by § 1981 is not delegable. That much we agree. But from this tautological premise they pretend to have established that a duty was created by the 1866 and 1870 Congresses to ensure against discrimination which one does not know about committed by non-agents over whom one has no control—that GBCA acquired a "non-delegable" affirmative duty to ensure that the work forces of all contractor-employers are not affected by discrimination.

The simple question before this Court, however, is, *what* duty did § 1981 impose on GBCA in the first place? As demonstrated in our opening brief, the duty created by § 1981 is a duty to refrain from intentional discrimination. GBCA complied with that duty. It did not attempt to rid itself of that duty or to "delegate" any statutory obligation to anyone. The collective bargaining agreement signed by GBCA, including the hiring-hall provision, was non-discriminatory. A. 19. The Congressional debates give no hint that § 1981 was designed *sub silentio* to make trade associations strictly liable for any subsequent discrimination by a union, outside of or in violation of the agreement, affecting an employer's workforce.

The "non-delegable duty" doctrine refers to situations in which an employer who is under a personal affirmative duty to protect others in certain respects, can be held liable for subsequent injury caused by a person whom he assigned to carry out that duty. The doctrine has no application here. As expressed in the *Restatement*:

> "A master or other principal *who is under a duty* to provide protection for or to have care used *to protect others* or their property and who confides the performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty." RESTATEMENT (2D), AGENCY § 214 (1958) (emphasis supplied).

This is an exception to the general rule of non-liability for the acts of an independent contractor, and arises where a statute specifically imposes an affirmative obligation on a property- or business-owner, usually in areas involving public safety, nuisances, and transportation franchises. Thus a common carrier may have a non-delegable duty to transport its passengers in safety; a property-owner a duty to refrain from obstructing or endangering the public highway; and a landlord a duty to maintain common passageways. W. PROSSER, TORTS § 71 at pp. 470-471 (4th ed. 1971). The cases typically involve an owner's liability for faulty maintenance work by contractors whom he has employed. See, *e.g.*, Annos., 23 A.L.R. 985 (1923); 29 A.L.R. 736 (1924); 20 AL.R.2d 868 (1951).

Section 1981, which deals with the equal right to make contracts, plainly is not the type of statute to which the "non-delegable duty" doctrine ever has been applied. "Non-delegable duties," furthermore, are imposed on those with ownership and control over the property or business involved. GBCA did not own or control the Union or any of the contractor-employers.[9] And most obviously, GBCA neither retained the Union as an independent contractor to perform any service, nor "delegated" anything to it.

This Court already has implicitly rejected the notion that 42 U.S.C. § 1983 contains any "non-delegable duty." In *Rizzo* v. *Goode*, 423 U.S. 362 (1976), it held that supervisory officials even in a municipal government have

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[9] Respondents assert that Petitioners had a "power to control the hiring process." I. & C. Br. 29. But the district court redefined "power to control" as "power to oppose," a far more tenuous concept. A. 163-64 n.61. Moreover, it is not explained how one could oppose discrimination of which one had no knowledge or notice. In any event, the right to sue a third party to make him perform a contractual obligation does not make that person an employee or agent. Nor is this a case where purported independent contractors were in fact under substantial control. *Cf. Northside Realty Associates, Inc.* v. *United States*, 605 F.2d 1348, 1353 (5th Cir. 1979).

no "affirmative duty" to prevent future misconduct by their subordinates and cannot be held liable for their subordinates' misconduct where it did not directly result from "the adoption of any plan or policy by [the supervisory officials] . . . showing their authorization or approval of such misconduct." 423 U.S. at 371, 376. This Court later emphasized that "the mere right to control without any control or direction having been exercised . . . is not enough to support § 1983 liability." *Monell* v. *Department of Social Services*, 436 U.S. 658, 694 n.58 (1978); *see also Owen* v. *City of Independence, supra*, 445 U.S. at 655 n.39, 657 (municipality not liable unless violation was pursuant to official policy). The import of these cases is plain enough: if a supervisor's right to control does not create a "non-delegable duty" under § 1983 to guarantee against misconduct by his own subordinates, then certainly there is no basis to impose such a duty here under § 1981, where GBCA was not a supervisor of a subordinate union and had no right to control its independent actions, much less a responsibility to do so.

Exhibiting a fundamental misunderstanding of their own theory, Respondents also argue that a "non-delegable duty" liability should be posited because the Union was supposedly the "hiring agent" for the contractors. This is a *non sequitur*, because a "non-delegable duty" is created by statute, not by the existence of an agency relationship, and liability does not depend on agency principles. In any event, the "hiring agent" cases cited by Respondents all concern an employer's liability under the doctrine of *respondeat superior* for the discriminatory conduct of its own supervisory employees.[10] None involves a union hiring hall, and none establishes any "non-

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[10] *See, e.g., Miller* v. *Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979); *Calcote* v. *Texas Educ. Foundation, Inc.*, 578 F.2d 95, 98 (5th Cir. 1978); *Barnes* v. *Costle*, 561 F.2d 983, 992 (D.C. Cir. 1977); *Flowers* v. *Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977); *Anderson* v. *Methodist Evangelical Hospital, Inc.*, 464 F.2d 723, 725 (6th Cir. 1972). Because the Union is not an employee of GBCA, the master-servant relationship required for *respondeat superior* liability is obviously absent here.

delegable duty" under § 1981 for an employer (much less a trade association) to guarantee against racial discrimination by a union. Indeed, the cases cited by Respondents expressly recognize that, even in a master-servant relationship and under Title VII, an employer will not be liable if the supervisor contravened employer policy without the employer's knowledge. *Barnes* v. *Costle*, 561 F.2d 983, 993 (D.C. Cir. 1977). Here, of course, the Union violated the non-discriminatory hiring hall agreement without non-employer GBCA's knowledge.

B. "Joint Enterprise" Theory

Respondents next contend that GBCA can be held liable under the theory that the Union's hiring hall was a "joint enterprise" that somehow included GBCA. The district court did not find any "joint enterprise" or purport to find any analogy in that doctrine. As stated in F. HARPER & F. JAMES, TORTS § 26.13, p. 1414 (1956):

> "This doctrine is applied almost exclusively in automobile cases, and has usually been invoked to impute the contributory negligence of the driver to a passenger-plaintiff . . . . The requirements for joint enterprise are commonly said to be (1) mutual interest in the purposes of the venture (usually, that is, of the trip), and (2) a mutual 'right of control over other members in directing that venture.'"

The Union's hiring hall meets none of these requirements. GBCA, a trade association, has no ownership or other interest in the Union's hiring hall and never used it for any purpose. GBCA has no "right of control" over the Union's members [11] and certainly no "equal voice

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[11] No one, it appears, can effectively control Local 542. While the Union is seeking to pass off responsibility for its own discrimination on persons like Petitioner who had no connection with the hiring hall, the Union's parent, the AFL-CIO, is taking exactly the contrary position. In its brief to this Court in No. 81-202, at 14, the AFL-CIO urges that

> "there is no possible principled basis for applying the doctrine of *respondeat superior* to impute discrimination by a union to the employer or *vica* [*sic*] *versa*."

in directing the conduct of the enterprise." PROSSER, *supra*, § 72, p. 475. Indeed, Respondents recognize that "Petitioners did not control the day to day operation of the hiring hall," Comm. Br. 15 n.15. This Court recently held that even an employment relationship and State funding did not make a State a "joint participant" in a criminal defense enterprise for purposes of 42 U.S.C. § 1983. *Polk County* v. *Dodson*, 102 S.Ct. 445, 451 n.12 (1981), *distinguishing Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961).

In addition, a joint enterprise is like a partnership that exists only for a single or limited number of transactions. To have a joint enterprise for a commercial or business purpose requires "sharing of profits and losses." HARPER & JAMES, *supra*, § 26.13, pp. 1413-1414; *accord*, PROSSER, *supra*, § 72, p. 475-476. The Union's hiring hall is not a business entity any more than is the Union's personnel office or its mail room. It cannot be characterized as similar to a partnership, for it is not for a limited number of transactions, and involved no sharing of "profits and losses."[12] It is not a

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[12] The sole case relied upon by Respondents in their discussion of "joint enterprises," *Stockwell* v. *United States*, 13 Wall. 531, 547-548 (1871), involved a partnership, not a joint enterprise, and applied the "general rule [that] partners are all liable to make indemnity for the tort of one of their number, committed by him in the course of the partnership business . . . ." Since Respondents do not claim that the Union's hiring hall was a "partnership," or that GBCA was a partner, the citation is both misleading and irrelevant.

Respondents also incorrectly assert that courts have held that a party to a collective bargaining agreement is liable for any discrimination "unless that party took every reasonable step to prevent or oppose the discrimination." The citations that follow this assertion hold no such thing. *Terrell* v. *United States Pipe & Foundry Co.*, 644 F.2d 1112, 1120 (5th Cir. 1981), and *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837 (5th Cir.), *cert. dismissed*, 434 U.S. 801 (1977), involved the liability of a union for a seniority system in a collective bargaining agreement that was *itself* discriminatory (as opposed to the non-discriminatory agreement involved in the present case). Interestingly, *Terrell* said that "even

separate entity at all.[13] The hiring hall is simply the Union—the procedure the Union uses to assign its members to jobs.

C. Agency Theory

Attempting to invoke agency principles, Respondents argue that the Union was GBCA's "hiring agent" and that "principals are commonly held liable for the intentional torts of their agents," irrespective of a principal's actual or constructive knowledge. I. & C. Br. 43. *The law is exactly the opposite*:

> "Since an agent who is not a servant is not subject to any right of control by his employer over the details of his physical conduct, the responsibility ordinarily rests on the agent alone, and the principal is not liable for the torts which he may commit." PROSSER, *supra*, § 70.[14]

Liability can be imposed on a principal under the doctrine of *respondeat superior* where the agent is in addition a *servant-employee*, but no master-servant relationship is involved here. The cases cited by Respondents are totally misdescribed, for all concern master-servant relationships and *respondeat superior* liability. *E.g.*, *New York C. & H.R.R.* v. *United States*, 212 U.S. 481, 493 (1909); *Cliquot's Champagne*, 3 Wall. 114 (1866) *Philadelphia & R.R.R.* v. *Derby*, 14 How. 468 (1852); *United States* v. *Gooding*, 12 Wheat. 459 (1827). *None* holds that a principal is ordinarily liable for intentional torts

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a union which signs a contract establishing an unlawful seniority system may suffer no liability if it actively opposed the adoption of this system." 644 F.2d at 1120. Under *Terrell* GBCA, which actively opposed the hiring-hall provision during the contract negotiations, would likewise be excused from liability even if the hiring-hall agreement had been discriminatory (which it was not).

[13] The district court began its opinion referring to "Local 542's function as an exclusive hiring hall," A. 6, and focused its findings on "the union hiring hall system." A. 20.

[14] HARPER & JAMES, *supra*, § 26.9 at p. 1389, which Respondents cite as authority, speaks of "holding the *master* for the . . . wrongs of his *servant*." (Emphasis supplied.)

of a non-servant agent. See also *Owen* v. *City of Independence*, *supra*, 445 U.S. at 655 n.39, 657 (rejecting *respondeat superior* under § 1983); *Monell* v. *Department of Social Services*, *supra*, 436 U.S. at 691 (same).

Moreover, the Union is not a "hiring agent"—not any kind of agent—for GBCA. Respondents ignore the basic definition of "agency," which is a "fiduciary relation" resulting from the "consent by one person to another that the other shall act on his behalf and subject to his control. . . ." RESTATEMENT (2D), AGENCY § 1. There is no "fiduciary relation" between GBCA and the Union and no consent by either for the Union to act on GBCA's behalf and subject to its control.[15] Moreover, the National Labor Relations Act mandates the very opposite. It requires that labor unions be independent and free from the influence of employers. See 49 Stat. 452, as amended, 29 U.S.C. §§ 158(a); 61 Stat. 157, as amended, 29 U.S.C. § 186. "The parties . . . proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest . . . ," *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 488-89 (1960), in what this Court has called "the arena of economic combat." *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 379 (1974). The idea that the Union is GBCA's agent is inconsistent with the basic design of national labor policy, as well as incorrect under agency law.[16] *Cf. California Brewers Ass'n* v. *Bryant*, 444 U.S. 598, 608 (1980).

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[15] "[A]s a matter of common knowledge, . . . we recognize that the contractors are compelled to rely on the construction craft unions as their prime or sole source of their labor . . . ." *Contractors Ass'n* v. *Secretary of Labor*, 311 F. Supp. 1002, 1011 (E.D. Pa. 1970), *aff'd*, 442 F.2d 159 (3d Cir.), *cert. denied sub nom. Contractors Ass'n* v. *Hodgson*, 404 U.S. 854 (1971).

[16] This labor-relations reality is recognized by labor as well as by management:

> "[C]ollective bargaining is not a process of delegation; it is, in large measure, combat between adversarial forces over the allocation of authority covering the employment process . . . . Furthermore, the authority to hire (or fire or promote) is not a duty which is vested by law in the employer unless 'delegated' by him; the premise of the collective bargaining system

Of course, these principles have been well recognized, for no court ever has held an employer liable for hiring-hall conduct that violated the National Labor Relations Act without proof that the employer knew of the Union's discrimination. See Pet. Br. 28-29. Even the district court admitted that the hiring-hall cases under § 1981 hold that there can be "no automatic employer liability upon proof of a union's discriminatory operation of a hiring hall." A. 146-47. Unlike Respondents, the district court knew, and willingly conceded, that it was making new law that was contrary to existing precedent. A. 142.

Behind all of Respondents' arguments is a fundamental misconception regarding the role of a trade association like GBCA. Respondents apparently believe that GBCA is a combination of an insurance company and a watch-dog commissioned to guard against employment discrimination in the construction industry. GBCA's actual role in this case was simply to function as a bargaining agent in multi-employer collective bargaining. Section 8(b)(1)(B) of the NLRA protects an employer's right to select his representative for purposes of collective bargaining. 49 Stat. 452, as amended, 29 U.S.C. § 158(b)(1)(B); *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 50 U.S.L. Week 4087 (U.S. Jan. 12, 1982); *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 94-95 (1957). GBCA's narrow role as bargaining agent is a totally inappropriate basis on which to impose broad strict liability for the Union's subsequent discrimination. To do so would penalize employers in the choice of a multi-employer association as a bargaining agent—contrary to the policy of the NLRA.[17]

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is that the question of who will exercise that and similar authority is an open one, to be resolved by negotiation . . . ." Brief for AFL and CIO as *Amicus Curiae* in Support of Petitioners, No. 81-202, at 19.

[17] And contrary also, of course, to First Amendment associational rights which are not absent from the labor-relations context. *E.g.*, *United Transp. Union* v. *State Bar*, 401 U.S. 576 (1971).

[Footnote continued on page 14]

III. MISCELLANEOUS MATTERS

A. The All Writs Act

As a fall-back, Respondents here argue (as they did not in the district court), that GBCA should be forced to pay 10% of the remedial payments on authority of the All Writs Act, 28 U.S.C. § 1651(a).[18] The district court did not claim such authority, and none of the cases Respondents cite did any such thing. In essence Respond-

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[17] [Continued]

Respondents correctly concede that the vicarious liability imposed on GBCA depended solely on the Union's hiring-hall abuses. I. & C. Br. 21-22 n.27; see A. 142. Yet in this Court for the first time Respondents suggest that discrimination by the JATC could be imputed to the associations. (The district court made no such holding; the complaint alleged the JATC to be an agent of the Union, but not of GBCA, J.A. 71; the defendant class was defined in relation to the Union contract, J.A. 334; and Respondents told the Court of Appeals that their claim against GBCA rested on alleged vicarious liability for discrimination "caused minorities *by Local 542*," not by the JATC. See Addendum A, p. 1a, *infra* (emphasis supplied).) The JATC, moreover, was an independent entity, not GBCA's agent. Its board consists of six trustees, of whom three came from the Union and three from employers affiliated with the contractor associations. The associations and Union do not run it; the individual trustees do. The trustees' fiduciary duty was to the JATC. The associations had no right to control the JATC. To impute any acts of the JATC back to the associations would be like holding the settlor of a trust responsible for subsequent breaches of duty by the trustee. The independence of such apprenticeship committees is commonly recognized both by statute, 78 Stat. 255, 42 U.S.C. § 2000e-2(d), and in the many Title VII cases in which such committees are found to be independent entities, and, as here, sued as separate entities. See, *e.g.*, *EEOC* v. *Sheet Metal Workers*, 463 F. Supp. 388, 422 (D.Md. 1978). The JATC was found liable as an entity, A. 141 n.52, *aff'd*, 648 F.2d 922, J.A. 431, and did not seek certiorari.

[18] Even under Title VII, an injunction may not be based simply on a party's agreeing to a lawful contract provision. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 356 (1977). "An injunction can issue only after the plaintiff has established that the conduct sought to be enjoined is illegal and that the defendant, if not enjoined, will engage in such conduct." *United Transp. Union* v. *State Bar*, *supra*, 401 U.S. at 584.

ents are hoping to load onto an eighteenth-century statute the burden a nineteenth-century one cannot carry.

The limited scope of § 1651 as applied to non-culpable third parties was carefully delineated in *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977). That case held that a telephone utility could be directed to provide non-burdensome technical assistance necessary for the implementation of a judicial order authorizing the installation of pen registers to investigate criminal offenses. This Court emphasized that "the power of federal courts to impose duties upon third parties is not without limits; unreasonable burdens may not be imposed." 434 U.S. at 172.

The money payments ordered here in no wise resemble the assistance order to the telephone company in *New York Telephone*:

—Unlike that case, the injunction as applied to GBCA is burdensome. *Cf.* 434 U.S. at 172, 175.

—Unlike that case, the injunction as applied to GBCA is not necessary to prevent frustration of a judgment. *Cf.* 434 U.S. 172, 175. Petitioner is providing no unique service; it is simply forced to pay money.

—Unlike that case, the injunction as applied to GBCA is not needed for law enforcement, *cf.* 434 U.S. at 175, nor is Petitioner a "highly regulated public utility," *id.* at 174.

—Unlike that case, the injunction as applied to GBCA does not implement specifically stated Congressional intent. *Cf.* 434 U.S. at 176; *Communications Workers* v. *NLRB*, 362 U.S. 479 (1960).

—Unlike that case, the injunction as applied to GBCA does not make GBCA whole. Quite the opposite. This Court emphasized that the telephone company was paid in full for the "meager assistance" it rendered, 434 U.S. at 174; indeed, Mr. Justice Stevens noted that the company might even make a profit, *id.* at 191 (opinion dissenting in part). Here, by contrast, GBCA is left simply paying for the Union's wrongdoing.

B. The § 1985(3) Claim

The district court rested the Petitioners' liability under § 1981 solely on a theory of "per se liability," A. 172, "as a result of their contractual relationship to and use of a hiring hall system which in practice effectuated intentional discrimination, whether or not the employers and associations knew or should have known." A. 142; see also A. 153, 163; I. & C. Br. 21-22 n.27. Accordingly, what Respondents have to say about the U.S. Department of Labor's 1969 "Philadelphia Plan" is irrelevant to the § 1981 issue before this Court. Respondents referred to the Philadelphia Plan in their unsuccessful effort to prove a § 1985(3) conspiracy. They claimed that Local 542 in 1968 exaggerated its minority membership to a U.S. Department of Labor employee; they argued that as a result, operating engineers were excluded from the Labor Department's "Philadelphia Plan," which required "affirmative action" hiring in certain construction trades as a precondition for eligibility for federal contracts.

The record shows the following:

1. The original Philadelphia Plan was announced in 1967. See A. 20; *cf.* E. O. 11246, 30 F.R. 12319 (1965); It was rescinded after an opinion by the Comptroller General that it was unlawful. See J.A. 173, 291-92; 48 Comp. Gen. 326 (1968).

2. Representatives of Local 542 and some associations (not GBCA) met in June 1968 with a U.S. Department of Labor representative. They agreed in July 1968 to establish a separate affirmative action program. A. 21; J.A. 144-49. In the course of the discussion, the Union said that approximately 650 of its 5,400 members were black. The Labor Department employee testified that at the time he had suspected union discrimination, see J.A. 172, 285, and that he had been "skeptical" of any figures, J.A. 282, 285. Although he also said that he would not have recommended approval of a plan containing inaccurate figures, J.A. 301, his testimony was that the reason operating engineers were not included in the

second Philadelphia Plan was "because they had developed an areawide affirmative action plan." J.A. 294, 173.[19]

3. Petitioner GBCA had no role at all in the discussions setting up the affirmative action plan. It simply two months later signed aboard the same agreement the Union and the other associations already had negotiated. A. 21; J.A. 160-61, 297.

4. In January 1969 to correct the figure the Union told the Department that its minority membership was only "about 350," adding: "I caution you that this is a guess which may be way off as to the number of minority members." J.A. 166. The Labor Department official acknowledged that "he cautioned that this was a guess." J.A. 203. The Department made no change in its plans. Six months later the second Philadelphia Plan was announced. J.A. 170, 292.

5. The district court criticized all the associations for inaccurate estimates by the Union about the Union's minority membership; it said their role should have been "like that of the accounting firm" certifying financial data. A. 25. It held, however, that "I do not on the present record find actual knowledge of the formal error in figures or of union discrimination generally," and accordingly held there was no violation of 42 U.S.C. § 1985(3). A. 168. Respondents did not appeal.

The holding was clearly correct, and has nothing to do with what is before this Court. The present case is about § 1981, not § 1985(3). The finding of the court on § 1981 was that Petitioner had not discriminated, had not intended to discriminate, had not known of the Union's discrimination, and had not had reason to know of it. A. 142, 204.

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[19] That exclusion on that basis was typical of identical exclusions in other regions. *Compare* J.A. 154-55 *with* J.A. 162-63; J.A. 297. Contrary to Respondents' statements, I. & C. Br. 38, the building industry was not exempted; employers remained subject to the Plan as it concerned other crafts. J.A. 171; *cf. Contractors Ass'n v. Secretary of Labor, supra.* Nor was there any finding of fraud.

C. Policy

An uncabined doctrine of strict liability holds dangers for all. There is no little irony in juxtaposing this case with its companion for argument, *NAACP* v. *Claiborne Hardware Co.*, No. 81-202, especially because the NAACP appears—on opposite sides—in both cases. In the present case, the NAACP signed the original complaint, J.A. 106, and now is arguing for holding Petitioner liable under an unprecedented theory in spite of the district court's findings of a total lack of knowledge or notice. NAACP Br. 9. Yet in *Claiborne Hardware* (where, unlike here, a conspiracy was found) the NAACP asks for relief from a substantial judgment against it that was rooted on a vicarious-liability theory that at least had some colorable claim to precedent in the common law.[20]

Respondents appeal to "policy considerations." I. & C. Br. 46. Matters of employment-discrimination policy should be addressed in the first instance to the Congress. This Court should not be asked to construct new systems by revision of ancient statutes enacted with no such sweep of liability in mind. When the Congress has acted in this area, it has done so carefully and comprehensively, in ways that assure clear definition of duties, adequate notice, fair procedures, and a balance of all the considerations that affect our complex society. In Title VII Congress did its job well. It can add to that law if that is what the country needs and wants. But the objectives of equal employment opportunity are not promoted in the long run by short-circuiting the process, creating *ex post facto* an unprecedented new kind of liability without

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[20] In its brief in No. 81-202, at 38, the NAACP argues:

> "[J]oint and several liability could not have been imposed on all the Petitioners—or any of them—except on findings that each of them *knew* unlawful conduct was being used to further the boycott and that each had the *specific intent* to further the boycott by illegal means. Neither of the lower courts made any of these constitutionally necessary findings." (Emphasis supplied.)

fault, and asking this Court to sit as a legislature weighing competing policies instead of searching for Congressional intent.

D. Disposition

Respondents have obtained full relief against the Union and the JATC. Respondents in addition attempted to prove discrimination by GBCA; they failed. A. 142. They attempted to prove intent or knowledge; they failed. A. 142, 204. They attempted to prove a conspiracy under 42 U.S.C. § 1985(3); they failed. A. 167-68. No other claims apply to GBCA.[21] The defendant class has been decertified. 90 F.R.D. 589. All that is left is the undisputed fact that GBCA as agent signed a lawful collective bargaining agreement. The legal effect of that under § 1981 is for this Court to decide. For non-employer GBCA, there is nothing else left to litigate.[22] After ten years in court, GBCA is entitled to a judgment in its favor. *United States* v. *Generes*, 405 U.S. 93, 106-07 (1972); *cf. Burks* v. *United States*, 437 U.S. 1 (1978); *Watts* v. *United States*, 394 U.S. 705, 708 (1969).

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[21] The limited scope of Respondents' claims against Petitioner was noted in their briefs in the Court of Appeals. See Addenda A, B, pp. 1a, 2a, *infra*; see also I. & C. Br. at 12 n.18: Comm. Br. at 1 n.1.

[22] The Union that discriminated now proposes that the employers and associations are blameworthy because—even though they had no knowledge or notice of it—they should have tried "to lay a restraining hand on the [Union's] hiring hall intentional discrimination, both by supervising the union and by taking corrective measures themselves." Local 542 Br. 9. But "no court will lend its aid to a party who founds his claim for redress upon an illegal act." *The Florida*, 101 U.S. 37, 43 (1880). "Under ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct." *City of Newport* v. *Fact Concerts, Inc., supra*, 101 S.Ct. at 2760. "Elemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen* v. *City of Independence, supra*, 445 U.S. at 654. In any event, the Union's brief gives no theory whatsoever on which non-employing *associations* could be held liable in further proceedings. See Local 542 Br. 9-13.

CONCLUSION

For the reasons stated here and in our opening brief, the judgment should be reversed.[23]

Respectfully submitted,

JOHN G. KESTER
JOHN J. BUCKLEY, JR.
Hill Building
Washington, D.C. 20006
Attorneys for Petitioner

Of Counsel:
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

February 8, 1982

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[23] Reversal in such circumstances amounts to a direction that judgment for Petitioner be entered in the lower court. *Cf. Vendo Co.* v. *Lektro-Vend Corp.*, 434 U.S. 425 (1978); *Town Court Nursing Center, Inc.* v. *O'Bannon*, 626 F.2d 1114 (3d Cir. 1980).

ADDENDA

ADDENDUM A

[Excerpt from Brief of Individually Named and Class Appellees, Nos. 80-2073/74 and 80-2159/63, United States Court of Appeals for the Third Circuit, December 22, 1980, page 6]

* * * *

"The named plaintiffs are twelve black men, with varying levels of heavy equipment experience and membership status in Local 542,[11] and the Commonwealth of Pennsylvania suing in its capacity as *parens patriae*. Together they alleged intentional racial discrimination in the operation of Local 542's exclusive hiring hall.[12]

* * * *

"[11] [Omitted.]

"[12] The complaint pled claims for relief against Local 542 for violations of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(c) and (d) ("Title VII"); Section 1 of the 1866 Civil Rights Act, 42 U.S.C. § 1981; Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d; the Union's duty of fair representation; and for conspiring with the employers and the employer associations in violation of 42 U.S.C. § 1985(3).

"Plaintiffs' claims for relief against the employers and the employer associations were predicated on their violations of both Section 1981 and 1985(3). Plaintiffs' theory from the outset has been that they too are responsible, as a class, for the discrimination in entry, referrals, hours and wages caused minorities by Local 542.

"Plaintiffs' case against the JATC turned on intentional violations of Section 1981 and 1985(3). Plaintiffs claimed discrimination in entry, suspensions and referrals to jobs."

ADDENDUM B

[Excerpt from Brief of Appellee, Commonwealth of Pennsylvania, Nos. 80-2073/74 and 80-2159/63, United States Court of Appeals for the Third Circuit, December 22, 1980, page 6]

* * * *

"Central to each of plaintiffs' claims against the various defendants[1] is Local 542's function as an exclusive hiring hall in its geographical area.

* * * *

"[1] Plaintiffs' complaint pled claims for relief against Local 542 for violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, the Union's duty of fair representation under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, and for conspiring with the employers and the employer associations in violation of 42 U.S.C. § 1985(3).

"Plaintiffs' claims against the employers and the employer associations were predicated on their violations of both 42 U.S.C. §§ 1981 and 1985(3). Plaintiffs' claims against the Joint Apprenticeship and Training Committee were predicated on Title VII as well as 42 U.S.C. §§ 1981 and 1985(3)."

Amicus Brief

2

MOTION FILED
MAR 4 1982

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No. 81-280, 330-333

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC., et al.,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF Black Economic Survival for leave to file out of time a brief amicus curiae and Brief of amicus curiae, Black Economic Survival

DENISE REINHARDT
PAUL SCHACHTER
Rutgers Labor Law Clinic
15 Washington Street
Newark, New Jersey 07102
201/648-5576

JONATHAN M. HYMAN
Rutgers Constitutional
Litigation Clinic
15 Washington Street
Newark, New Jersey 07102
201/648-5687

ATTORNEYS FOR AMICUS CURIAE,
Black Economic Survival

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DENISE REINHARDT
PAUL SCHACHTER
Rutgers Labor Law Clinic
15 Washington Street
Newark, New Jersey 07102
201/648-5576

JONATHAN M. HYMAN
Rutgers Constitutional
Litigation Clinic
15 Washington Street
Newark, New Jersey 07102
201/648-5687

ATTORNEYS FOR AMICUS CURIAE,
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IN THE
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OCTOBER TERM, 1981

No. 81-280, 330-333

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC., et al.
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,
Respondents.

MOTION OF
BLACK ECONOMIC SURVIVAL FOR
LEAVE TO FILE OUT OF TIME
A BRIEF AMICUS CURIAE

Black Economic Survival hereby moves, pursuant to Supreme Court Rules 36 and 42, for leave to file the annexed brief amicus curiae in support of the position of the respondents in these proceedings. Consent to the timely filing of this brief has been given by counsel on behalf of petitioners General Building Contractors Association, Inc., United Engineers and Constructors, Inc., Bechtel Power

Corporation, respondent Commonwealth of Pennsylvania and the individual and class respondents. Consent was withheld on behalf of petitioners the Contractors Association of Eastern Pennsylvania and Glasgow, Inc.

Black Economic Survival (BES) is a community organization formed in New York City in 1968, whose purpose is the promotion of equal employment opportunity in the construction industry. Its members are Black and Hispanic construction workers. Denied access to skills training and referrals by unions, they direct their efforts toward the contractors. BES organizes daily "shapes" at construction sites at which unemployed Black and Hispanic construction workers present themselves for work. This activity is the way in which BES members secure jobs from which they have been traditionally excluded. BES also works with contractors,

employers' associations and public contracting agencies to improve minority representation in the construction trades in New York City, and coordinates its efforts with other organizations whose goals and procedures are similar.

BES brings to these proceedings its abiding concern for racial equality in the construction trades and in employment in general. BES can lend its special understanding of the reality of racial discrimination in the industry. Finally, BES speaks for the organized respone by Black and Hispanic workers to institutional employment discrimination, a voice not heard in these proceedings. It is these workers whose interests the Court will determine in deciding this case.

BES had originally attempted to file a timely brief in forma pauperis which was rejected by the Clerk by letter dated January 15, 1982 on the basis that

BES failed to fulfill the criteria for such status. That letter was received on January 21, 1982. BES's brief in this present form was prepared with as much dispatch as could be mustered.

Accordingly, Black Economic Survival requests that it be permitted to represent those interests as amicus curiae in these proceedings, and that leave be granted it to file out of time.

Respectfully submitted,

DENISE REINHARDT
PAUL SCHACHTER
Rutgers Labor Law Clinic

JONATHAN M. HYMAN
Rutgers Constitutional
Litigation Clinic

15 Washington Street
Newark, New Jersey 07102
201/648-5576

ATTORNEYS FOR Black Economic
Survival

Dated:
January 6, 1982

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion for Leave to File Out of Time a Brief Amicus Curiae, with a Brief Amicus Curiae of Black Economic Survival, was served on the following persons, who are all those required to be served, by first-class mail, postage prepaid, this 6th day of January, 1982:

Harold I. Goodman
Germaine Ingram
Counsel for Individually Named and Class Respondents
Community Legal Services, Inc.
Sylvania House
Juniper and Locust Streets
Philadelphia, Pennsylvania

Harvey Bartle III
Attorney General
Joel M. Ressler
Deputy Attorney General
Counsel for Respondent Commonwealth of Pennsylvania
Department of Justice
Strawberry Square
Room 42, 16th Floor
Harrisburg, Pennsylvania 19120

John G. Kester
John J. Buckley, Jr.
Hill Building
Washington, D. C. 20006
Attorneys for Petitioner General
Building Contractors Association,
Inc.

Bernard G. Segal
Martin Wald
Nicholas N. Price
1719 Packard Building
Philadelphia, Pennsylvania 19102
Attorneys for Petitioner United
Engineers and Constructors, Inc.

John J. McAleese, Jr.
Thomas J. McGoldrick
Louis A. Minella
Suite 240, One Bala Cynwyd Plaza
Bala Cynwyd, Pennsylvania 19004
Attorneys for Petitioner Glasgow, Inc.
and
Attorneys for Petitioners The
Contractors Association of Eastern
Pennsylvania and the United
Contractors Association

Robert W. Kopp
David M. Pellow
One Lincoln Center, Syracuse, N.Y. 13202
Attorneys for Petitioner Bechtel
Power Corporation

JONATHAN M. HYMAN
ATTORNEY FOR AMICUS CURIAE,
BLACK ECONOMIC SURVIVAL
Rutgers Constitutional
Litigation Clinic
15 Washington Street
Newark, New Jersey 07102

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INTERESTS OF AMICUS CURIAE

Black Economic Survival (BES) is a community organization of Black and Hispanic construction workers dedicated to the promotion of equality of job opportunities in the construction industry for its members and others similarly situated. Formed in New York City in 1968, BES has seen minority participation in construction there grow from only one to the current five percent. This minimal growth has not occurred as the result primarily of civil rights enforcement or of voluntary compliance by contractors or union hiring halls. It is due rather to the efforts of BES and a score of similar organizations.

The members of BES have been excluded from the benefits of union hiring halls and joint apprenticeship systems. They have found that affirmative action programs promise much, but produce neither

training nor continued employment. BES therefore directs its efforts towards employers, who ultimately have the power to hire them. Through daily "shapes" at construction sites by unemployed Black and Hispanic construction workers, BES and other organizations achieve jobs and training for their members.

BES brings to these proceedings its concern for racial equality in the construction industry, together with its particular expertise in the relationship between the construction trades unions and contractors. Moreover, BES represents the organized response by Black and Hispanic workers to institutional racism, hitherto unheard in this case.

With the grants of certiorari in General Building Contractors Association Inc., et al. v. Commonwealth of Pennsylvania, et al., and its companion cases, cert. granted, 50 U.S.L.W. 3292, case

below, Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers, 648 F.2d 923 (3d Cir. 1981), this Court has chosen to consider the breadth and depth of the protections afforded to black job applicants and employers by 42 U.S.C. § 1981. Amicus believes that Section 1981 was enacted to establish in this country a labor market system free of all racial discrimination.

Like many similar community organizations, amicus is deeply troubled by the continued systemic race discrimination in our country, and by the unf lfilled promises of civil rights legislation. Amicus sees in the lives of its own members the fulfillment of the grim prophecy of the Report of the U.S. Commission on Civil Disorders in 1968,* that our nation

* Kerner, Report of the National Advisory Commission on Civil Disorders, Bantam, New York, 1968 at 398.

is moving toward two separate and unequal societies, one Black and one white. They suffer the consequences of the broadening gulf between these societies in economic, social and political deprivation, as well as in increased racial violence directed at their efforts to gain more than token employment in the construction industry.

This case raises the profound question of whether Section 1981 reaches racial discrimination carried out through an employer's "neutral" conduct of accepting a third party's discriminatory administration of a joint hiring system and whether that employer can be enjoined to provide a remedy for the discrimination. Amicus views this case as presenting the issue crucial to the achievement of racial equality in our nation, namely, whether an employer may freely engage in racial discrimination by delegating authority to

a referral system neutral in form but discriminatory in practice and effect. Imposition by this Court of the duty to correct discrimination only upon the referring unions will certainly ensure the continuation of exclusion of Black and HIspanic workers from the construction trades.* It will clearly signal to all employers that they need only surrender some control over hiring to a third party to avoid their responsibility not to discriminate.

Such a holding, amicus believes, would run directly counter to the intended thrust of Section 1981. Moreover, amicus is convinced that its result would be the maintenance of the construction industry as a white preserve, and fears the extension of such pressures to other industries.

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* United Steelworkers of America, AFL-CIO, CLC v. Weber, 443 U.S. 193 (1979) at 198 fn.1.

SUMMARY OF ARGUMENT

The Thirteenth Amendment to the Constitution created a new national right of Black freedom. To promote that right, the Congress enacted a statute which it intended to create a free labor market in the formerly feudal South. In specifically discussing interference with employment contracts, the Congress considered that employers, by entering into combinations which restrained contract formation of former slaves, violated the civil rights of freedmen. Thus, the reading of Section 1981 by the courts below finds support in the legislative history.

Attribution of the union's unlawful racial discrimination to employers and their associations is also called for by the public interest in eliminating racial discrimination. To do otherwise will promote employer evasion of the duty to offer all persons equal employment opportunity.

Finally, the Thirteenth Amendment, Section 1981's broad legislative purpose and Section 1981's scope and substance all support the law's proscription of all racial discrimination in employment, even where no showing of intent is or can be made.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF SECTION 1981 MANDATES THE ATTRIBUTION OF THE UNION'S INTENTIONAL RACIAL DISCRIMINATION TO THE EMPLOYERS AND EMPLOYER ASSOCIATIONS

In reading Section 1981, the first step is to study the conditions in the South as they were reported to Congress by Major General Carl Schurz. By the end of the Civil War, the social structure of the South was in complete disorder. The basic agrarian economy of the South had relied on slave labor. After emancipation and ratification of the Thirteenth Amendment to the Constitution there were no more slaves.

Some freedmen and women had congregated in or near garrison towns, seeking protection of the union forces. Others restlessly searched for the new way of life they believed would follow emancipation. The greatest numbers remained on the plantations to which they had formerly been bound, unsure of their status and even more uncertain of their future. Relations between former master and slave were clouded by unsettled legal issues; neither the planters nor the freedmen had grasped the reality of the end of slavery. Some planters who did comprehend nonetheless deceived their former slaves and attempted to maintain antebellum conditions. An "experiment" in free labor, the fall harvest in 1865, had "extremely unfavorable" results. Among them was serious resistance by freedmen and planters to the concept of contracts for labor. Many former slaves had no notions

of voluntary legal obligations; many feared that the execution of contracts, which they could not read, would enslave them again. Planters were convinced that Black people were incorrigible, improvident shirkers; when freedmen broke the contracts they had never full understood, the growers felt entirely justified in resorting to the physical compulsion they had administered to their slaves. Planters also routinely violated contractual terms, or introduced fixed charges into the labor contract which reduced freedmen to the servitude of debt.*

As Schurz observed, it was vain to expect that those who had rebelled to protect their system of slave labor would adopt with alacrity the new dispensation of free labor. While some land owners called for deportation of all former

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* Senate Executive Document No. 2, 39th Cong., 1st Sess., Dec. 19, 1865 (Report of Maj. Gen. Carl Schurz) at 15-17.

slaves and importation of European or Asian laborers, others had visions of a new society that differed in form from the old, but not in substance. In many areas, these powerful men worked together to erect legal and extralegal constraints around the freedmen's ability to contract. Vagrancy laws and ordinances, neutral in form, required all those without apparent means of support to be committed into the service of local growers. Statutes dictated term of labor contracts which converted freedmen into peons. Former slaveowners entered into combinations, whereby all agreed not to hire former slaves without the permission of their former masters. Slavery de jure had been abolished, but in fact the majority of freedmen continued in conditions of slavery.* Thus did the systematic and collective opposition to the freedmen's

* Id. at 21-23.

own enjoyment of the benefit of their labor become manifest.

It was these devices of discrimination which the Thirty-ninth Congress examined when it considered the enactment of the statute which is now codified at 42 U.S.C. §1981. Jones v. Alfred H. Mayer Co., 392 U.S. 362, 427-428 (1968); Croker v. Boeing Co., ___ F.2d ___, 26 FEP Cases 1569, 1590 (Gibbons, dissenting) (3d Cir. 1981). It was to these denials of the freedmen's right to contract that Section 1981 was addressed.*

The supporters of the bill envisioned a new society which would be based upon free labor, with wages and working conditions determined in the open market. Section 1981 was designed to revolutionize Southern society and give practical effect to the Thirteenth Amendment in its fullest

* See, for example, Cong. Globe, 39th Cong., 1st Sess., 92-94; 111; 319-323; 340-343; 1121-1123; 1151-1160; 1164-1165.

terms, by ensuriog that freedmen would finally enoy the fruits of their labor, the fruits which formerly benefitted their white owners.*

Section 1981 by its own terms creates the duty of all contractors not to discriminate on the basis of race among those with whom they will contract, or on terms to which they will contract. Section 1981 clearly regulates private contracts of employment. Johnson v. Railway Express Agency, 421 U.S. 454 (1975). The question presented by this case is whether that duty is breached when an employer allows its employment decisions to be mediated by a third party who discriminates intentionally against a class which has traditionally been excluded from a construction craft. That question must be answered in the affirmative.

In 1866, the Congress recognized

* Cong. Globe, 39th Cong., 1st Sess., 1150-1152.

that while the body of slavery had been destroyed, its spirit continued. The Civil Rights Act was proposed and, simply put,

> Its object is to secure a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding and enjoying the proceeds of their toil.
>
> (Rep. Windom) Cong. Globe, 39th Cong., 1st Sess., at 1164 (1866)

The expectations of some statesmen, including Andrew Johnson, that market conditions -- the need for laborers in agriculture and in restoration of disrupted rail systems and industry -- would dictate unfetterred, arm's-length bargains between freedmen and their former masters, were defeated.* In fact, throughout the subdued confederacy, the land owners combined together to define the terms under which they would consent to enter into

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* Cong. Globe, 39th Cong., 1st Sess., at 1164 (1866).

contracts with freedmen. Some of these combinations delegated to a freedmen's former master the ability to determine the conditions of an employment contract between the freedman and a potential employer. The former owner was given the power to prevent such a contract through a denial of a permit to hire out. The former owner was also delegated the authority to set the wages for the freedman.* Section 1981 was intended to rid labor contracts of this interference, both by the stranger to the employment relation as well as by the delegating employers.

Obviously, the Congress did not consider possible interference with equality of employment contract by labor organizations, such as that which the lower court found had been engaged in by the union in this case. In 1866, unions themselves

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* Senate Executive Document No. 2, supra; Cong. Globe, 39th Cong., 1st Sess., 93-94; 517; 1160 (1866).

were viewed as unlawful combinations.* What the Congress intended, however, was the promotion of a free labor market for freedmen and their descendants. The 1866 Act was designed to reorder the feudal society within which slavery had been maintained.** It was a massive piece of social engineering, which placed Blacks and whites on an equal footing in terms of civil economic rights. As the considerations of the planters' agreements shows, the Congress established a clearcut duty to be evenhanded which could not be evaded by delegation of partial control to a third party.

While the control given former slaveowners is not completely congruent with that delegated to a union and its hiring hall the similarities are striking.

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* Commonwealth v. Hunt, 4 Met. 111 (Mass. Sup. Jud. Ct. 1842).

** Cong. Globe, 39th Cong., 1st Sess., 129, 474-476, 599-600; 1151-1152.

The former owner could veto a candidate for employment or determine the wage of a "permitted" applicant. The union in this case, whose sphere of influence is typical, as petitioners contend, determines who shall acquire the skill to practice the craft, and who, skilled or unskilled, shall be referred for employment. In both cases, the employers set up a permit system to be administered by another, who determines qualifications for and conditions of work. Ultimately, however, it is the contractors who employ those approved by the union, just as plantation owners finally entered into or abjured employment relations with the freedmen who had permits to contract out. The Congress attributed interference to all parties. The conclusion that Section 1981 imposes injunctive liability on an employer which has only "blindly" hired those who were discriminatorily referred thus finds ample

support in the legislative history.*

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* Several of the petitioners and the amici in their support argue that the employers and the employer associations retained no practical control over the hiring hall process. This is patent nonsense. First, the District Court found as a matter of fact that "the contractors did not, however, relinquish power to affect the union's operation of the hiring hall," referring to contractual grievance machinery in the event of breach. 469 F. Supp. at 342. Not only is this finding not directly challenged here or below, but the challenge would, of course, necessarily be held to the "clearly erroneous" standards. Second, the employers and their associations were at all times at liberty to initiate an action under 29 U.S.C. §301 to enforce the collective bargaining agreement to the fullest extent of its terms. Third, the associations and their member employers could at any time have insisted lawfully upon a bargaining demand which resulted in appropriate minority representation in the craft. United Steelworkers of America v. Weber, supra; Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975). If at any time the union engaged in a strike with the unlawful end of forcing contractors not to achieve minority representation, that strike could be enjoined. See, e.g., United States v. International Association of Operating Engineers, 14 FEP Cases 1400 (D. Or. 1977).

By the Thirteenth Amendment, this nation established and proclaimed the new federal right of Black freedom. By Section 1981, the Congress implemented that right in its broadest terms, by outlawing racial discrimination and racism in civil, economic life. Specifically, the Congress found that combinations which restrained a freedman's access to employment opportunity interfered with that freedman's right to contract. This finding created the duty of all contractors to avoid discrimination which interfered with contract formation -- their own discrimination, or that of someone acting in concert.

Notice was given over one hundred and fifteen years ago that, to eradicate racism, tolerance of discriminatory interference by a contractor would thenceforth expose him to civil and criminal liability. That it has taken this long for our nation to give this meaning to Section 1981, and

only with regard to liability for prospective injunctive relief correcting for the discriminatory interference, speaks tellingly not of the true legislative purpose, but of the shameful disregard of that purpose.

II. THE PUBLIC INTEREST IN ERADICATING ALL VESTIGES OF SLAVERY DEMANDS ATTRIBUTION OF THE UNION'S UNLAWFUL MOTIVE TO THE EMPLOYERS AND EMPLOYER ASSOCIATIONS

The legislative record is not the sole reason why Section 1981's ambit must not be limited to those who actually and in fact practice the discriminatory interference. Even a cursory examination of the history of racial exclusion in the construction industry demonstrates that the brave and broad purpose of the Thirty-ninth Congress to eradicate all the badges and incidents of slavery must not be thwarted.

Racial discrimination throughout the construction industry, by employers and unions alike, is so widespread and well

known as to be an appropriate subject for judicial notice.* The industry, employers and unions alike, has practiced systematic racial discrimination which has excluded Blacks from skills training and jobs. From formal color bars to informal networks of nepotism by irrelevant tests and subjective criteria the Black job seeker finds his path to employment blocked.**

Where the hiring hall system has been adopted, the usual practice of civil rights agencies and individual plaintiffs has been to attack the union's practices head on. Construction employers are generally only joined, in Title VII actions, as parties to collective bargaining agreements and not as active

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* United Steelworkers of America v. Weber, supra, at 198 n.1.

** See generally, Gould, Black Workers in White Unions, Cornell University Press, Ithaca (1968) at 281-296.

wrongdoers. Remedial decrees typically run only to the unions, and prescribe schedules for admission to union membership and apprenticeship programs, as wel as even-handed referrals.*

These decrees are not enforced.** More telling is th conclusion that, without the wholehearted support and commitment of employers, remedial orders against the construction craft union alone will not effect the changes in basic recruitment and referral practices required to achieve a nondiscriminatory

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* See, e.g., E.E.O.C. v. Local 14 and 15, International Union of Operating Engineers, 415 F. Supp. 1155 (S.D.N.Y. 1976), aff'd in part, rev'd in part, 553 F.2d 251 (2d Cir. 197); E.E.O.C. v. Local 638 (Sheetmetal Workers Local 28), 401 F. Supp. 467 (S.D.N.Y. 1975); United States v. Enterprise Assn. of Steamfitters Local 638, 360 F. Supp. 979 (S.D.N.Y. 1973), aff'd with modification, 501 F.2d 622 (2d Cir. 19 4); United States v. Local 638 (Ironworkers Local 40), 347 F. Supp. 169 (S.D.N.Y. 1972); United States v. Wood, Wire and Metal Lathers, 328 F. Supp. 429 (S.D.N.Y. 1971), aff'd, 471 F.2d 408 (2d Cir. 1973).

** Gould, supra, at 316-337.

hiring system.* On the other hand, years of "voluntary compliance" with U.S. Department of Labor affirmative action requirements, pursuant to Executive Order 11246, under which an employer may be held liable for failure to comply, while the union eludes responsibility, hav left minority representation in the trades at equally minimal levels.**

Ooly the inclusion in remedial decrees of both partners to this sophisticated system of institutionalized job discrimination will promote full equality of employment opportunity. Conversely, if contractors can evade responsibility for racial exclusion by delegating to a third party the authority to define the racial contours of their workforces, the

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* U.S. General Accounting Office, Federal Efforts to Increase Minority Opportunities in Skilled Construction Craft Unions Have had Little Success (Report to Congress) (March 15, 1979) at ii, 21-23.

** Id.

burdens or slavery, exclusion from the construction crafts, will continue to be borne by the descendants of slaves.

Section 1981, as Justice Stewart recognized, must be given the broad remedial sweep of its language and purposes. Jones v. Alfred H. Mayer Co., supra, at 437. To carve an exception for employers who voluntarily contract to accept referrals from union hiring halls would repudiate the legislative intent and judicial interpretation this Court has given thus far. The holding concerning Section 1981 by the courts below should be affirmed.

III. SECTION 1981 PROSCRIBES ALL RACIAL DISCRIMINATION IN EMPLOYMENT EVEN ABSENT PROOF OF DISCRIMINATORY INTENT

Amicus agrees with respondents that this case may be resolved without reaching the difficult issue of the quantum of proof necessary to establish a violation of Section 1981. Nonetheless, amicus

respectfully urges this Court, if the issue must be reviewed, to consider the arguments presented below. Amicus believes that the recent readings of Section 1981 as well as the broad purposes found in the legislative history of the Thirteenth Amendment and the Civil Rights Act of 1866, mandate a holding that Section 1981 is violated, in the context of private employment contracts, by a showing of discriminatory impact alone.

A. Section 1981, in Fulfilling the Purposes of the Thirteenth Amendment Was Intended to Eradicate All Racial Discrimination in Employment

The framers of the Thirteenth Amendment were in no doubt about their intentions to abolish slavery, together with all its vestiges, badges and incidents.*

* Cong. Globe, 38th Cong., 1st Sess., 1319, 1321, 1324, 1439-1440 (1866); tenBroeck, The Thirteenth Amendment to the United States Constitution, 39 Cal. L. Rev. 171, 180 (1951).

In contrast with the Fourteenth Amendment, which guarantees equal protection of the laws, the Thirteenth Amendment created a new federal right of Black freedom from slavery and the private practice of its presumptions and practices of racial inferiority:*

> 'By its own unaided force and effect,' the Thirteenth Amendment 'abolished slavery, and established universal freedom.' Civil Rights Cases, 109 U.S. 3, 20, 3 S. Ct. 18, 28. Whether or not the Amendment itself did any more than that--a question not involved in this case--it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.' Ibid. (Emphasis added.)
>
> Jones v. Alfred H. Mayer Co., supra, 392 U.S. at 439, quoted in City of Memphis v. Greene, ___ U.S. ___, 101 S. Ct. 1584, 1599 (1981)

* Cong. Globe, 38th Cong., 1st Sess. 2987 (1866); Kinoy, The Constitutional Right of Negro Freedom, 21 Rutgers L. Rev. 387 (1967); Hodges v. United States, 203 U.S. 1, 27 (Justice Harlan dissenting) (1906).

In introducing the bill which became the 1866 Civil Rights Act, Senator Trumbull, its author and Chairman of the Judiciary Committee, "described its objectives in terms that belie any attempt to read it narrowly." Jones v. Alfred H. Mayer Co., 392 U.S. 362, 431 (1975). Trumbull's remarks on that occasion, and throughout the debates, center on his design to secure for the former slaves legal and practical freedom from all forms of racial discrimination with respect to their civil rights.*

When the bill passed the House, it "too believed that it was approving a comprehensive statute forbidding all racial discrimination affecting the basic civil rights enumerated in the Act." Jones v. Alfred H. Mayer Co., supra, 392 U.S. at 435 (emphasis in original). The

* Cong. Globe, 39th Cong., 1st Sess., 129, 474, 476, 599-600.

bill's supporters in the House echoed the bold and revolutionary purpose first proclaimed in the Senate, that the freedmen should be thereby practically rid of all the disabilities of their former condition.*

Beyond the general climate of the Congress is the evidence contained in Senate Executive Document No. 2, a report of "central importance" to the deliberations on the Civil Rights Act. Croker v. Boeing Co., supra, ___ F.2d ___, 26 FEP Cases at 1590 (Gibbons, dissenting). Schurz's report and discussions of other reports adequately demonstrate that the Congress was painfully aware of the socially neutral private conspiracies, statutes and ordinances which denied equal employment opportunity to

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* Cong. Globe, 39th Cong., 1st Sess., 1151-1152; 1160-1165.

the freedmen.*

Specific and careful attention was given to the vagrancy regulations contained in the Black Codes.** These vagrancy laws and ordinances in the South were facially neutral.*** Their enforcement fell with resounding impact upon the Black freedmen, binding them again to service in derogation of their right to contract freely.**** The Congress examined these provisions and their discriminatory effects with the full knowledge that these neutral devices of reenslavement were the acts of citizens whose states

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* Senate Executive Document No. 2, supra, at 21-23, 29; Cong. Globe, 39th Cong., 1st Sess., 93-94, 1123.

** Cong. Globe, 39th Cong., 1st Sess., 603, 605, 607-608, 1123-1124, 1151-1153, 1160.

*** See E. McPherson, The Political History of the United States During the Period of Reconstruction, 29-44 (1871).

**** Cong. Globe, 39th Cong., 1st Sess., 1123 (1866).

sought readmission and reunion, and therefore had reason to hide their motives.* Section 1981 was intended not only to remedy the effects of vagrancy laws and their private analogues, but also to eliminate all discriminatory subterfuges of a racist society and its institutions. This dynamic principle, which is proclaimed through the debates, demands the application of Section 1981's mandate of equality to the institutionalized racism of the construction industry, as practiced by union hiring halls and as perpetuated by employers and their collective bargaining agents.

B. Section 1981 is Distinct in Form and Substance from the Fourteenth Amendment

Petitioners and amici in their support argue that Section 1981 should be read to reflect the standards of proof

* Cong. Globe, 39th Cong., 1st Sess., 1159 (1866).

necessary to establish a violation of the Equal Protection Clause of the Fourteenth Amendment. Such a mechanical argument finds no support in the cases previously decided by this Court, which hold that the Civil Rights Act of 1866 was an exercise of the enforcement clause of the Thirteenth Amendment. Runyon v. McCrary, 427 U.S. 160, 168-170 (1976); City of Memphis v. Greene, supra, at 1599. The statute merits an independent examination under those terms, which few Circuit Courts of Appeals have given.*

The substance of Section 1981 and the Fourteenth Amendment is easily distinguished. Section 1981 prohibits racial discrimination in contracts, including private contracts of employment. Jones v. Alfred H. Mayer Co., 392 U.S. 409,

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* See cases gathered in Brief for Petitioner Bechtel Power Corporation at 14-15.

441-443 (1968); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-460 (1975). The Fourteenth Amendment is limited to proscription of state discrimination. Thus, a decision in this case will have no effect on the principles enunciated in Washington v. Davis, 426 U.S. 229 (1976), where this Court held that only proof of intentional discrimination will invalidate official conduct under the Equal Protection Clause. This conclusion rests in part on the presumption of legitimacy afforded governmental acts, itself a constitutional result of the separation of powers. Such considerations are obviously not present here, nor in any controversy involving private employment.*

* It should be noted that of the 6 cases cited by Petitioner Bechtel as holding that Section 1981 is violated only by intentional racial discrimination, only one--Croker v. Boeing Co., supra, involved a non-governmental defendant.

What is to be considered is the unquestionable power of the Congress "to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." Jones v. Alfred H. Mayer Co., 392 U.S. at 440, quoted in City of Memphis v. Greene, supra, 101 S. Ct. at 1599 n.39. In its efforts to eliminate racial discrimination, the Congress may establish standards of conduct and proof which give greater protections than the guarantees of the constitutional source.*

CONCLUSION

Section 1981 was enacted to protect rights established by the Thirteenth Amendment to the Constitution. The statute was an integral part of a grand design, which included the law's applica-

* See, for example, Fitzpatrick v. Bitzer, 427 U.S. 445, 453, n.9 (1976); Dothard v. Rawlinson, 433 U.S. 321, n.14 (1977).

tion to all forms of racial discrimination in formation and enforcement of employment contracts.

Other civil rights legislation has not effectively increased minority representation in the construction industry. Section 1981 could now be recognized for what it is, and used to remedy the miserably small Black representation in the trades.

There are no other legal alternatives. Left without the broad protections of Section 1981, Black workers will increasingly turn to self-help. Left without hope of equal opportunity as one more bright promise fades, our society will undergo the great social disorder engendered by racial inequality and racial discrimination in civil rights.

For these foregoing reasons, amicus curiae Black Economic Survival, respectfully requests that this Court affirm the judgment and decree below in all respects.

Respectfully submitted,

DENISE REINHARDT
PAUL SCHACHTER
Rutgers Labor Law Clinic

JONATHAN M. HYMAN
Rutgers Constitutional
Litigation Clinic
15 Washington Street
Newark, New Jersey 07102
201/648-5576

ATTORNEYS FOR AMICUS CURIAE,
Black Economic Survival

Dated:
January 4, 1982

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No. 81-280, 330-333

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC., et al.
Petitioners,

v.

COMMONWEALTH OF EPNNSYLVANIA, et al.,
Respondents.

NOTICE OF APPEARANCE

The Clerk will enter my appearance as counsel for Amicus Curiae Black Economic Survival.

I certify that I am a member of the Bar of the Supreme Court of the United States.

15 Washington Street
Newark, New Jersey

Dated:

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF Black Economic Survival for leave to file out of time a brief amicus curiae and Brief of amicus curiae, Black Economic Survival

DENISE REINHARDT
PAUL SCHACHTER
Rutgers Labor Law Clinic
15 Washington Street
Newark, New Jersey 07102
201/648-5576

JONATHAN M. HYMAN
Rutgers Constitutional
Litigation Clinic
15 Washington Street
Newark, New Jersey 07102
201/648-5687

ATTORNEYS FOR AMICUS CURIAE,
Black Economic Survival

Amicus Brief

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Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

[Attorneys Listed on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
THOMAS R. BAGBY
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for the Amicus Curiae, Equal Employment Advisory Council

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

This brief amicus curiae of the Equal Employment Advisory Council (EEAC) is respectfully submitted pursuant to the written consent of the named parties,[1] and in support of the petitioners.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) and 42 U.S.C. § 1981 as well as other equal employment statutes and regulations. As such, they have a direct interest in the issues presented for the Court's consideration in the instant case—i.e., whether proof of intent to discriminate is necessary to establish a violation of § 1981, and whether contractor associations and contractors who neither intentionally discriminated nor knew of or had reason to know of a union's discrimina-

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[1] Their consents have been filed with the Clerk of the Court.

tory hiring hall practices may be held liable under § 1981 for the union's discrimination.

Because of its interest in the issue of the nature of proof required to establish a violation of § 1981, EEAC filed a brief as amicus curiae in *County of Los Angeles v. Davis*, 440 U.S. 625 (1979) (case dismissed on other grounds as moot). On numerous other occasions, EEAC has filed briefs as amicus curiae in this Court. *See, e.g., Texas Department of Community Affairs v. Burdine*, 101 S. Ct. 1089 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

In 1961 and thereafter, Local 542 of the International Union of Operating Engineers (Local 542) concluded a bargaining agreement with petitioner contractor associations under which an exclusive hiring hall system was agreed to and under which Local 542 became the exclusive source through which operating engineers in Eastern Pennsylvania and Delaware were to be employed. The hiring hall system on its face was racially neutral.

In 1971, the Commonwealth of Pennsylvania and twelve black plaintiffs on behalf of a class filed suit against the following: Local 542 and its Joint Apprenticeship Training Committee (JATC); a class of construction contractors, represented by named defendant Glasgow, Inc., and consisting of potentially more than 1400 contractors or employers who received referrals through Local 542's exclusive hiring halls; and four construction trade associations which represented the contractors in contract negotiations with Local 542. The claims against the Union, insofar as are here relevant, were based upon Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* and 42 U.S.C. § 1981 and alleged discrimination resulting from

the operation of the exclusive hiring halls in the membership practices and referral system of Local 542 and in the hours worked and wages earned by minority operating engineers who were members of Local 542. Plaintiffs alleged that the contractors and associations, having agreed to the exclusive hiring hall system, were liable under 42 U.S.C. § 1981 for discrimination resulting from the operation of the hiring halls. No claim was asserted against the contractors or associations under Title VII since none of the contractors or associations were named in the charge filed with EEOC.

The plaintiff class, as certified by the District Court, consisted of all minority persons who were applicants, future applicants or deterred applicants, members, registrants, apprentices or otherwise affiliated with Local 542. The defendant class, as certified, consisted of all contractor associations which were parties to a collective bargaining agreement with Local 542 and all contractor-employers subject to collective bargaining agreements with Local 542 who hired at least one operating engineer during the relevant time period.

After a lengthy trial, the District Court,[2] in an opinion reported at 469 F. Supp. 329 (E.D. Pa. 1978), found that Local 542 and the JATC had intentionally discriminated against minorities in membership opportunities, job referrals and wages and hours. The Court found that this intentional discrimination was effectuated by Local 542 through its exclusive hiring halls and contrary to the non-discrimination provision of the bargaining agreement.[3]

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[2] A. Leon Higginbotham, Jr., United States Circuit Judge sitting by designation.

[3] Prior to May 1, 1971, Article II, § 2(d) of the agreement expressly mentioned only discrimination on grounds of nonmembership in the union. After May 1, 1971, Article II, § 1 was added:

> No employee, or applicant for employment, shall be discriminated against by reason of race, religion, color, or national origin.

The District Court found that the plaintiffs had failed to prove that the contractors or associations intended to discriminate or that they had knowledge or reasonable notice of Local 542's discrimination. 469 F. Supp. at 401, 412-13. Nevertheless, the Court found that ". . . the contractors and associations are injunctively liable to the plaintiff class under § 1981 as a result of their contractual relationship to and use of a hiring hall system which in practice effectuated intentional discrimination, *whether or not the employers and associations knew or should have known.*" 469 F. Supp. at 401 (Emphasis added). The Court expressly determined that a § 1981 claim may be established without proof of an intent to discriminate, relying primarily on the now-vacated 2-1 decision by the Ninth Circuit in *County of Los Angeles v. Davis*, 440 U.S. 625 (1979).

The Judgment and Decree entered by the District Court, and reported at 502 F.Supp. 7 (E.D. Pa. 1979), set forth numerical "goals" for minority hours worked, membership in the union, and referrals for employment. Each contractor-employer was obligated under the Judgment and Decree to meet the minority utilization goals by the following means: first, by referrals from Local 542; second, if necessary, by hiring and employing minority operating engineers not affiliated with Local 542 and; third, by hiring and employing minorities not currently skilled and not affiliated with Local 542 by providing on-the-job training to such persons. By a subsequent Post Decree Order, the defendant associations and the named contractor were assessed a portion of the costs related to the injunctive relief ordered by the Court. *See* 507 F. Supp. 1146 (E.D. Pa. 980) (Bechtle, District Judge).

On appeal, the Third Circuit, sitting *en banc*, unanimously affirmed at 648 F.2d 922 (3d Cir. 1981) the portion of the judgment holding that Local 542 and the

JATC had intentionally discriminated.[4] The Third Circuit, sitting *en banc*, also affirmed at 648 F.2d 923 (3d Cir. 1981), by an equally divided court, that portion of the judgment which found the associations and the class of contractor-employers injunctively liable under § 1981.

SUMMARY OF ARGUMENT

The determination of the Third Circuit that a violation of § 1981 can be established in the absence of an intent to discriminate or knowledge or notice of such discrimination is contrary to the will of Congress as expressed in the legislative history of § 1981 and to the decisions in this Court and numerous Circuit Courts of Appeals. As a practical matter, the decision below will seriously undermine this Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976), and will jeopardize efficient enforcement of the federal equal employment opportunity program.

Section 1981 shares a unique common history with the equal protection clause of the Fourteenth Amendment and is expressive of the same Congressional policies. This Court has recognized that a major impetus behind the enactment of the Fourteenth Amendment was the desire of Congress to incorporate into the Constitution the protections of Section 1 of the Civil Rights Act of 1866 (a predecessor of § 1981). Likewise, this Court has recognized that the reenactment of what is now § 1981 in 1870 and its codification in 1874 were steps toward enforcing the constitutional provisions of the Fourteenth Amendment. Given this close relationship of § 1981 with the Fourteenth Amendment, the standard of proof for § 1981 should be consistent with that required for Fourteenth Amendment claims.

Section 1981, by guaranteeing to all persons "the same right. . . to make and enforce contracts. . . as is enjoyed

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[4] The affirmance of this portion of the judgment is not at issue herein.

by white citizens," is fundamentally an equal protection statute. In *Washington v. Davis*, this Court held that proof of a racially discriminatory intent or purpose is required in order to establish an equal protection violation. The same proof of intent should be required under § 1981.

The legislative history of § 1981 establishes that Congress was concerned with acts of intentional discrimination designed to deny to blacks their basic civil rights. Nothing in the legislative debates evidences Congressional concern over facially neutral practices with a discriminatory impact or any other actions undertaken without an intent to discriminate. The Third Circuit's adoption of an "impact" standard under § 1981 directly contravenes Congressional intent that the section cover only acts of intentional discrimination.

Prior decisions of this Court have found violations of § 1981 and other Reconstruction era civil rights statutes only where there has been evidence of intentional discrimination. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Runyon v. McCrary*, 427 U.S. 160 (1976). This Court has also deemed it appropriate in interpreting other Reconstruction era statutes to require proof of intentional discrimination where the legislative history reveals Congress' desire that only such intentional acts be covered. *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

Since the equal protection clause of the Fourteenth Amendment and § 1981 are virtually coextensive, the adoption of an "impact" standard for claims under § 1981 would jeopardize "a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome on the poor and to the average black than to the more affluent white." *Washington v. Davis*, 426 U.S. at 248. This was precisely the result which this Court sought to avoid in *Washington v. Davis*. In addition, Congress sought through enactment of Title VII to encourage the prompt and voluntary conciliation of

employment discrimination claims. Accordingly, Title VII has a relatively short statute of limitations and mandates administrative conciliation efforts prior to commencement of suit. In contrast, § 1981 imposes no preconditions to suit and benefits from longer limitations periods. If an "impact" standard is adopted under § 1981, claimants will be encouraged to circumvent Title VII conciliation and limitation requirements simply by alleging § 1981 claims instead of or in addition to Title VII claims.

Finally, a determination that "intent" is required under § 1981 is dispositive of the claims against the associations and contractors herein, since the Court below expressly found that the plaintiffs failed to prove that the associations or contractors intended to discriminate or that they had knowledge or reasonable notice of Local 542's discrimination.

ARGUMENT

I. THE HISTORICAL AND CONCEPTUAL CONNECTION OF § 1981 WITH THE FOURTEENTH AMENDMENT, THE LEGISLATIVE HISTORY OF § 1981, PRIOR DECISIONS OF THIS COURT, AND SOUND POLICY REASONS ALL ESTABLISH THAT PROOF OF INTENTIONAL DISCRIMINATION IS NECESSARY UNDER § 1981.

The decision of the Third Circuit, sitting *en banc*, in affirming the District Court decision herein is contrary to decisions of eight other circuits[5] which have either

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[5] *Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9 (1st Cir. 1979); *Guardians Ass'n v. Civil Service Comm'n*, 633 F.2d 232 (2d Cir. 1980), *petition for cert. filed*, 50 U.S.L.W. 3157 (U.S. Aug. 31, 1981) (Nos. 81-431, 432); *Williams v. De Kalb County*, 582 F.2d 2 (5th Cir. 1978); *Grigsby v. North Mississippi Medical Center, Inc.*, 586 F.2d 457 (5th Cir. 1978); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 101 S. Ct. 3079 (1981); *City of Milwaukee v. Saxbe*, 546 F.2d 693 (7th Cir. 1976); *Mescall v. Burrus*, 603 F.2d 1266 (7th Cir. 1979); *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir.), *cert. denied*, 439

held or implied that proof of intentional discrimination is necessary under § 1981. The Third Circuit decision is also contrary to a subsequent *en banc* ruling of the Third Circuit that § 1981 claims require proof of purposeful discrimination.[6]

As is demonstrated herein, in order to effectuate the intent of Congress in enacting § 1981 and for sound policy reasons, the decision of the Third Circuit should be reversed.

A. The Close Correlation of § 1981 with the Equal Protection Clause of the Fourteenth Amendment Requires Proof of Intent Under § 1981.

This Court on numerous occasions has examined the constitutional and legislative origins of the Reconstruction era civil rights enactments. *See Runyon v. McCrary*, 427 U.S. 160, 168-75 (1976); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 285-96 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975); *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 439-40 (1973); *cf. City of Memphis v. Greene*, 101 S. Ct. 1584, 1601-04 (1981); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 417-37 (1968). A review of the historical origins and legislative history of § 1981 in particular, however, is necessary in order to provide insight into Congressional intent regarding the enactment of § 1981.

U.S. 986 (1978); *Donnell v. General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978); *Craig v. County of Los Angeles*, 626 F.2d 659 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 1364 (1981); and *Chicano Police Officer's Ass'n v. Stover*, 552 F.2d 918 (10th Cir. 1977). *But see Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830, 838, n.22 (D.C. Cir. 1977).

[6] *Croker v. Boeing Co.*, —— F.2d ——, 26 FEP Cases 1569 (3d Cir. 1981).

It is now clear that § 1981 [7] is derived from both § 16 of the Voting Rights Act of 1870 [16 Stat. 144] and § 1 of the Civil Rights Act of 1866 [14 Stat. 27]. *Runyon v. McCrary*, 427 U.S. at 169, n.8. Section 1 of the 1866 Act [8] was enacted pursuant to § 2, the enabling clause, of the Thirteenth Amendment.[9] *Buchanan v. Warley*, 245 U.S. 60, 78 (1917). This Court has noted on several occasions that "the operative language of both § 1981

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[7] Section 1981, entitled "Equal Rights Under the Law," provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[8] Section 1 provided in pertinent part:

> That all persons born in the United States and not subject to any foreign power, ... are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

[9] The Thirteenth Amendment provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

and § 1982 [10] is traceable to the Act of April 9, 1866." *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 410 U.S. at 439; *Runyon v. McCrary*, 427 U.S. at 171.

Shortly after the enactment of the 1866 Act, concerns developed in Congress that the statute might be repealed by a subsequent Congress and that its application to the states might be contrary to the constitution. A joint resolution addressing these concerns eventually became the Fourteenth Amendment. *United States v. Wong Kim Ark*, 169 U.S. 649, 675 (1898); *Hurd v. Hodge*, 334 U.S. 24, 32-33 (1948). This Court and historians have recognized that a major impetus behind the enactment of the Fourteenth Amendment was the desire of Congress to incorporate into the Constitution the provisions of the 1866 Act so as to remove any constitutional doubts about the Act and to prevent a future Congress from repealing it. *Hurd v. Hodge*, 334 U.S. at 32-33. *See also* R. BERGER, GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 23 (1977); H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 81 (1908); H. GRAHAM, EVERYMAN'S CONSTITUTION 291 (1968). As one commentator has noted, "over and over in this debate [on the Fourteenth Amendment] the correspondence between Section One of the Amendment and the Civil Rights Act is noted. The provisions of one are treated as though they were essentially identical with those of the other." [11] This Court recognized the close correlation of the 1866 Civil Rights Act and the Fourteenth Amendment when it stated in *Hurd v. Hodge* that

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[10] Section 1982, "Property Rights," provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

[11] Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 Stan. L. Rev. 5, 44 (1949).

the two enactments were "expressions of the same general congressional policy." 334 U.S. at 32.

Shortly after the passage of the Fourteenth Amendment,[12] the 1866 Act was reenacted in the Voting Rights Act of 1870. *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 422, n. 28; *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 410 U.S. at 439 n. 11. Section 18 of the 1870 Act[13] simply reenacted the 1866 Act in its entirety. Section 16 of the 1870 Act,[14] with minor modifications, carried for-

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[12] The Fourteenth Amendment provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

[13] Section 18 provided in pertinent part:

> That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby reenacted. . . .

[14] Section 16 provided:

> That all persons within the jurisdiction of the United States *shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens*, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any

ward the language of § 1 of the 1866 Act. The scope of the 1866 Act, however, was not altered by the modification in the 1870 re-enactment. *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 436.

The direct linkage of the 1866 and 1870 enactments to the Fourteenth Amendment was implicitly reaffirmed by this Court following the 1874 codification of § 16 of the 1870 Act into § 1977 of the Revised Statutes.[15] *United States v. Wong Kim Ark*, 169 U.S. at 695; *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 410 U.S. at 439, n. 11. In *Strauder v. West Virginia*, 100 U.S. 303, 312 (1879), the Court noted that § 1977 put "in the form of a statute what had been substantially ordained by the [Fourteenth] amendment. It was a step towards enforcing the constitutional provisions." Similarly, in *Buchanan v. Warley*, 245 U.S. at 79, § 1977 was described as a statute "enacted in furtherance of the [Fourteenth Amendment's] purpose." Revised Statutes § 1977 now appears as 42 U.S.C. § 1981.

As is clear from the above discussion of the origins of § 1981 and the Fourteenth Amendment, the two enactments share a common history and are expressive of the same congressional policies. Both are fundamentally equal protection enactments. The Fourteenth Amend-

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State in conflict with this provision is hereby declared null and void. (Emphasis added)

Section 16 applied to "all persons", not merely "all citizens" as Section 1 of the 1866 Act had. Section 16 also added the language concerning "taxes, licenses and exactions of every kind".

[15] R.S. § 1977 provided that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other.

This is the precise language now codified as § 1981.

ment provides that "No state shall . . . deny to any person . . . *equal* protection of the laws." (Emphasis added). Section 1981 likewise provides that "all persons . . . shall have the *same* right in every state . . . to make and enforce contracts . . . and to the *full and equal* benefit of all laws for the security of persons and property as is enjoyed by white citizens". (Emphasis added)[16]

Section 1 of the 1866 Act and its progeny have always been viewed as the guarantors of equal protection of the laws, or as stated by this Court in *United States v. Wong Kim Ark*, 169 U.S. at 695, "the protection of equal laws." In explaining the purpose of the bill which was eventually to become Section 1 of the 1866 Act, its author and principal Senate supporter, Senator Trumbull, stated that "any statute which is not *equal to all*, and which deprives any citizen of civil rights, which are secured to other citizens is an unjust encroachment upon his liberty; and it is in fact a badge of servitude which by the Constitution is prohibited." Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (Emphasis added). Similarly, in the House, Representative Shellabarger, a bill proponent, contended that it secured "*equality of protection* in those enumerated civil rights which the States may deem proper to confer upon any races." *Id.* at 1293-94 (Emphasis added).

This Court has held in *Washington v. Davis*, 426 U.S. 229 (1976), that proof of a racially discriminatory intent or purpose is required in order to establish an equal protection violation. *See also Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977). The close historical and conceptual relationship between § 1981 and the Fourteenth Amendment mandates the same standard of purposeful discrimination for § 1981 as is required under the Fourteenth Amendment.

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[16] The Fourteenth Amendment and § 1981 are set forth in pertinent parts in nn. 13 and 8, *supra*.

This construction is supported by the reasoning in prior decisions of this Court. In *Hurd v. Hodge, supra*, this Court was asked to decide whether judicial enforcement of racially discriminatory real estate restrictive covenants by the courts of the District of Columbia violated Revised Statutes § 1978—the predecessor of § 1982. After noting both the "close relationship between § 1 of the Civil Rights Act and the Fourteenth Amendment" and the holding in *Shelley v. Kraemer*, 334 U.S. 1 (1948), that the Fourteenth Amendment forbids such discrimination where imposed by state courts in the enforcement of restrictive covenants, the Court concluded that the *Shelley v. Kraemer* Fourteenth Amendment holding *"is clearly indicative of the construction to be given the relevant provisions of the Civil Rights Act."* 334 U.S. at 33 (Emphasis added). In precisely the same fashion, given the "close relationship" between § 1 of the Civil Rights Act and the Fourteenth Amendment, this Court's holding in *Washington v. Davis* that purposeful discrimination must be shown to establish an unlawful employment practice under the Fourteenth Amendment "is clearly indicative of the construction to be given the relevant provisions [i.e., § 1981] of the Civil Rights Act." *Id.* Since proof of discriminatory purpose or intent is required to establish a violation of the equal protection clause of the Fourteenth Amendment, the same should be required in order to establish a violation of § 1981.

B. The Legislative History and Prior Decisions of this Court Establish that § 1981 Was Directed Toward Acts of Purposeful Discrimination.

The concurring opinion of Justice White in *City of Memphis v. Greene*, 101 S. Ct. at 1601-04, convincingly sets forth the basis for requiring proof of an intent to discriminate under § 1982. Since this Court has held that, "In light of the historical interrelationship between Sec. 1981 and Sec. 1982, there is no reason to construe

these sections differently when applied [to private forms of discrimination]," *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 410 U.S. at 440, the rationale of the concurring opinion in *City of Memphis v. Greene* is equally applicable to this case as an aid to the proper construction of § 1981.

As Justice White recounted in that opinion, the legislative history of the 1866 Civil Rights Act, from which both § 1981 and § 1982 derived, demonstrates that the 39th Congress, which enacted the 1866 Act, was concerned with acts of intentional discrimination designed to deny blacks their basic civil rights. Nothing in the extensive legislative debates supports the proposition that Congress intended the 1866 Act (and its successor, § 1981) to cover facially neutral practices which might result in a discriminatory impact or any other actions undertaken without an intent to discriminate.

Prior to the formal ratification of the Thirteenth Amendment in December 1865, a number of the southern states had enacted legislation designed to deny to blacks their basic civil rights. This Court, in the *Slaughter House Cases*, 83 U.S. 36, 70 (1872), described the laws in effect in certain of these states immediately after the passage of the Thirteenth Amendment:

> Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value . . .
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> They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and

> were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

Likewise, Senator Trumbull, sponsor of the bill that became the 1866 Act, stated that the bill was designed to eliminate the abuses of blacks that were routinely occurring in the southern states:

> Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the constitutional amendment.

Cong. Globe, 39th Cong., 1st Sess. 474 (1866).[17]

As Justice White observed, "The supporters of the bill emphasized time and again that the measure was designed to eradicate *blatant deprivations* of civil rights. See, e.g., Cong. Globe, 39th Cong., 1st Sess., 322, 339-340, 474-475, 516-517, 1123, 1151-1152, 1159-1160, 1833-1835 (1866)." *City of Memphis v. Greene*, 101 S. Ct. at 1603 (White J., concurring) (Emphasis added). Similarly,

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[17] These legislative enactments of the southern states were known as "Black Codes" and most contained express restrictions on the property, employment and marriage rights of blacks. The Mississippi "Black Code", which was the most debated of the codes, expressly prohibited blacks from owning farm land. 1865 Miss. Laws § 1. For the substance of the "Black Codes", see H.R. EXEC. DOC. No. 118, 39th Cong., 1st Sess.; S. EXEC. DOC. No. 6, 39th Cong., 2d Sess.; E. MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 29-44 (1871); K. STAMPP, THE ERA OF RECONSTRUCTION 79-81 (1965).

various proponents of the bill stated during the debates that enactment of the bill was necessary to protect blacks from "damnable violence", "barbarous cruelties", "wrong and outrage" and "fiendish oppression".[18] Numerous instances of beatings and murders of freedmen were recounted during the course of the debates on the Freedmen's Bureau Bill, S. 60, 39th Cong., 1st Sess. (1866) [19] and the Civil Rights Bill. *See, e.g.*, the remarks of Sen. Creswell, Cong. Globe, 39th Cong., 1st Sess. 339 (1866), that "combinations of returned rebel soldiers have been formed for the *express purpose* of persecuting, beating most cruelly, and in some instances actually murdering the returned colored soldiers of the Republic" (emphasis added).

Many of the "Black Codes" contained "vagrancy laws" under which vagrants were typically defined as persons without employment or business. *See* E. McPherson, *supra*, at 29-44. Commonly the vagrancy laws authorized local authorities to arrest vagrants and hire them out at little or no pay. Justice White correctly noted in *City of Memphis v. Greene*, 101 S. Ct. at 1603-04, n. 6 (White, J., concurring) that the legislative references to these "ostensibly neutral" statutes provide no basis to infer the creation of a disparate impact standard. Rather, Congress' concern was that these laws were intentionally used to oppress blacks. The Congressional debate surrounding the enactment of these vagrancy laws focused on the fact that they were passed with an intent to discriminate against recently freed blacks:

> Vagrant laws have been passed; laws which under the pretense of selling these men as vagrants, are *calculated and intended* to reduce them to slavery

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[18] Cong. Globe, 39th Cong., 1st Sess., 631, 833, 1159, 2773 (1866).

[19] The Freedman's Bureau Bill, after passing both Houses of Congress, was vetoed by President Johnson. See Cong. Globe, 39th Cong., 1st Sess., 129, 209, 421, 688, 748, 775, 915-16, 943 (1866).

> again; and laws which provide for selling these men into slavery in punishment of crimes of the slightest magnitude. . . .

Cong. Globe, 39th Cong., 1st Sess., 1123 (1866) (remarks of Mr. Cook); *see also id.*, at 1151 (remarks of Mr. Thayer), 1160 (remarks of Mr. Windom). (Emphasis added).

The Mississippi vagrancy statute, frequently cited in the debates, provided that unemployed freedmen were vagrants and established a poll tax on free blacks, with failure to pay the tax being viewed as evidence of vagrancy. Local officials were given the authority to hire out such vagrants to whomever was willing to pay the poll tax. 1865 Miss. Laws §§ 2, 6, 7. The objections to these laws voiced in Congress were based on the understanding that they were intentionally designed to subject freed blacks to a system equivalent to slave labor.

The legislative record is thus replete with evidence that § 1981 was designed to eradicate intentional discrimination of the sort then prevalent in the South. On the other hand, there is *nothing* in the extensive legislative history of § 1981 which supports the proposition that Congress was concerned with anything *other* than intentional or purposeful discrimination.[20] The legislative history of

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[20] *See City of Memphis v. Greene*, 101 S. Ct. at 1603 (White, J., concurring) ("But nothing in the legislative history of this [1866] Act suggests that Congress was concerned with facially neutral measures which happened to have an incidental impact on former slaves"); *Croker v. Boeing Co.*, —— F.2d ——, 26 FEP Cases at 1577 ("We think that it is more likely than not that the statute was addressed to such intentional conduct . . . The employees have not directed our attention to any legislative history that reveals a contrary intent. We doubt that they could"); *Guardians Ass'n v. Civil Service Comm'n.*, 633 F.2d at 267 ("It is sufficient to say that plaintiffs have been unable to cite and we have been unable to find *anything* in the legislative history to indicate that either the Thirty-Ninth Congress, which enacted the 1866 Act over a presidential veto, or the later congresses that subsequently re-enacted the provision understood the law to prohibit anything other than

§ 1981 is in dramatic contrast to the legislative history of the Civil Rights Act of 1964, which shows substantial Congressional concern over the "effects" which facially neutral practices might have in denying employment opportunities.[21]

Prior decisions of this Court finding violations of § 1981 and related Reconstruction era legislation have all involved instances of intentional discrimination. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 426, this Court, in reference to § 1 of the 1866 Act and § 1982—but with equal applicability to § 1981—held that § 1 of the 1866 Act was intended to prohibit all "racially motivated" deprivations enumerated in the statute. Similarly, in *Runyon v. McCrary*, 427 U.S. at 170-71, this Court held that § 1981 is violated "if a private offeror refuses to extend to a Negro, *solely because he is a Negro*, the same opportunity to enter into contracts as he extends to white offerees". (Emphasis Added). Thus, both *Jones* and *Runyon* support the requirement of proof of purposeful discrimination under § 1981.

Such a construction of § 1981 would also yield consistency with this Court's interpretations of 42 U.S.C. § 1985(3).[22] In *Griffin v. Breckenridge*, 403 U.S. 88

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the racially motivated refusal to treat whites and non-whites in the same, neutral manner"). *See also* Note, *Burden of Proof in Racial Discrimination Actions Brought Under the Civil Rights Act of 1866 and 1870: Disproportionate Impact or Discriminatory Purpose?* 1978 B.Y.U.L. Rev. 1030.

[21] *Griggs v. Duke Power Co.*, 401 U.S. 424, 434-36 (1971); *see also* Congressional concern regarding: higher unemployment and lower median income of blacks, 110 CONG. REC. 8348-49 (1964); facially neutral employment testing, 110 CONG. REC. 5614-16, 5662-64, 5999-00, 7012-13, 7247, 8447, 9024-26, 9599-00, 13504, 13724 (1964); use of statistics to prove discrimination, H.R. REP. NO. 914, 88th Cong., 2d Sess., *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2440-41, 2477.

[22] 42 U.S.C. § 1985(3) reads as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another,

(1971), this Court was called upon to decide whether § 1985(3) covered private conspiracies to deprive blacks of their rights. After determining that the legislative history of § 1985(3) evidenced the intent of Congress that the statute should apply only to acts of intentional discrimination, the Court stated:

> The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. . . The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.

403 U.S. at 102 (Citation omitted) (Emphasis in original). The Court went on to hold that Congress was within its powers under § 2 of the Thirteenth Amendment in enacting § 1985(3).

Thus, the Court in *Griffin* determined, based on the legislative history of § 1985(3) and the equal protection

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for the purpose of depriving either directly or indirectly, any person or class of persons of the *equal protection of the laws or of equal privileges and immunities under the laws* [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation against any one or more of the conspirators. (Emphasis added)

Section 1985(3) was derived from the Civil Rights Act of 1871 and is commonly referred to as the "Ku Klux Klan Act"

language contained in the statute (even though appearing in a statute based on the Thirteenth Amendment), that proof of intent was necessary under § 1985(3). A similar analysis of the language and legislative history of § 1981 leads to the same conclusion—that proof of purposeful discrimination is necessary in order to establish a violation of § 1981.

C. Sound Policy Reasons Exist for Requiring Proof of Intent Under § 1981.

In *Washington v. Davis*, this Court explained the practical consequences which would flow from applying a disproportionate impact standard to Fourteenth Amendment claims:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and, perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

426 U.S. at 248. (Citation omitted). The Court concluded that extension of the disproportionate impact standard beyond those areas where it is already available by virtue of Title VII "should await legislative prescription." *Id.* Affirmance of the Third Circuit in this case might well produce the "far reaching" result which this Court in *Washington v. Davis* expressly sought to avoid.

Section 1981 guarantees to all races not only the "same right . . . to make and enforce contracts", but also the "same right . . . to the *full and equal benefit of all laws and proceedings* for the security of persons and property" as is enjoyed by whites. (Emphasis added). The scope of § 1981's prohibitions is thus virtually coextensive with that of the equal protection clause of the Fourteenth

Amendment, and both extend far beyond the area of employment. Accordingly, if a lesser standard of liability is applied to § 1981 than to the Fourteenth Amendment, the holding in *Washington v. Davis* can be circumvented entirely through the expediency of alleging a § 1981 rather than a Fourteenth Amendment claim.

The application of an "impact" standard to § 1981 would also create the likelihood that the extensive administrative scheme which Congress has provided for under Title VII would be substantially undermined. It is clear that Congress, in enacting Title VII, did not intend for § 1981 and Title VII to be viewed as coextensive. Thus, this Court has recognized that the two enactments have always been viewed as providing "separate, distinct and independent remedies for employment discrimination". *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 461. This Court also noted in *Johnson* that § 1981 and Title VII are neither procedurally nor substantively coextensive and that Congress has, in fact, created "independent administrative and judicial remedies". *Id.*

Under Title VII, a charge of discrimination must be filed within 180 days of an alleged unlawful employment practice and a complaint must be filed in federal court within 90 days of receipt of a right-to-sue notice. Sections 706(e) and 706(f)(1), 42 U.S.C. § 2000e-5(e) and (f)(1). Under § 1981, there are no administrative prerequisites to suit and an action must be filed only within the varying state limitations periods. *See, e.g., Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 460-62. Thus, the adoption of an impact standard under § 1981 would allow a plaintiff to by-pass the administrative procedures under Title VII and benefit from longer limitations periods merely by alleging a violation of § 1981 instead of or in addition to a Title VII count.

The extension of the "impact" standard to § 1981 would also encourage persons with claims of employment discrimination to seek relief under § 1981 instead of under

Title VII because additional remedies, such as compensatory and punitive damages, may be available under § 1981. *Johnson v. Railway Express Agency, Inc.* 421 U.S. at 460. In addition, if the standard of proof is determined to be the same under § 1981 as under Title VII, plaintiffs may be encouraged to resort to § 1981 actions because the two year statute of limitations for back pay under Title VII is not contained in § 1981. *Compare* Section 706(g), 42 U.S.C. § 2000e-5(g) *with Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 462.

The Third Circuit's decision in this case would also frustrate the intent of Congress that attempts at conciliation of employment discrimination claims be exhausted prior to the institution of suit. *See e.g., Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 359-360 (1977). As this Court recognized in *Alexander v. Gardner-Denver*, 425 U.S. 36, 44 (1974), cooperation and voluntary attempts to resolve charges of discrimination through the administrative procedures set forth in Title VII were the preferred means chosen by Congress for resolving such claims. If an impact standard is adopted for § 1981, persons with claims of employment discrimination may elect to bypass this administrative scheme, with the resultant increase in federal cases which might otherwise have been resolved through the administrative conciliation process.

II. CONTRACTOR ASSOCIATIONS AND CONTRACTORS WHO NEITHER INTENTIONAALY DISCRIMINATED NOR KNEW OF OR HAD REASON TO KNOW OF UNION'S DISCRIMINATORY HIRING HALL PRACTICES MAY NOT BE HELD LIABLE UNDER § 1981.

A determination by this Court that proof of discriminatory intent is necessary under § 1981 is dispositive of the claims against the contractor associations and the contractors. The District Court herein expressly found that the plaintiffs failed to prove that the associations or

contractors intended to discriminate or that they had knowledge or reasonable notice of Local 542's discrimination. 469 F. Supp. at 401, 412-13. The District Court's finding of liability against the associations and contractors was based upon its determination that proof of intent was not required to establish a claim under § 1981. Because there was an express finding by the District Court after a review of all the evidence that the associations and contractors did not intentionally discriminate, and because, as indicated above, proof of intentional discrimination is required under § 1981, the imposition of liability upon them is incorrect as a matter of law and should be reversed.[23]

---

[23] It should be noted that neither the National Labor Relations Act cases nor the Title VII cases cited by the District Court support the imposition of vicarious liability on the associations or contractors in the absence of *at least* some showing of knowledge on their part. In *Morrison-Knudsen Co., Inc.*, 275 F.2d 914, 917 (2d Cir. 1960), *cert. denied*, 366 U.S. 909 (1961), it was clear that the employer had knowledge of the collection of a license fee from non-union members and of the union's discriminatory referrals. Other Courts of Appeals have also required knowledge by the employer as a condition of holding an employer liable for union discrimination. See, e.g., *Lummus Co. v. NLRB*, 339 F.2d 728, 737 (D.C. Cir. 1964); *NLRB v. Master Stevedores Association*, 418 F.2d 140, 142 (5th Cir. 1969). Likewise, the Title VII hiring hall cases cited in the District Court opinion declined to find liability where there was no knowledge or active participation by the employers in discriminatory referral practices. *See Vogler v. McCarty, Inc.*, 294 F. Supp. 368 (E.D. La. 1968), *aff'd sub. nom. Heat and Frost Insulators and Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); *Allen v. Pipefitters Local Union No. 208*, 56 F.R.D. 473 (D. Colo. 1972); *McFadden v. Baltimore Steamship Trade Association*, 8 FEP Cases 391, 393 (D. Md. 1972); *Byrd v. Local Union No. 24*, 375 F. Supp. 545 (D. Md. 1974). The seniority system cases relied upon by the District Court were decided prior to this Court's decision in *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (which held that bona fide seniority systems were lawful despite their discriminatory impact), and in any event, involved instances where the negotiated agreement *itself* was the cause of the discrimination. Neither the NLRA nor the Title VII cases cited by the District Court addressed the issue presented herein, i.e. whether proof of intent is required under § 1981.

As a practical matter, the absence of liability against the associations and contractors will not interfere with the lower Court's ability to formulate a remedy which will be sufficient to overcome the effects of the discrimination by Local 542 and its JATC. The thrust of the District Court's finding of discrimination against Local 542 and its JATC concerned discriminatory union membership practices and referrals to contractor-employers. Since the contractor-employers have a continuing legal responsibility under Title VII and § 1981 not to discriminate in employing persons referred to them, the imposition of membership and referral goals on Local 542 and its JATC, along with the other remedies imposed on them, will be sufficient to overcome the union's and JATC's past discriminatory practices.

CONCLUSION

For the foregoing reasons, the EEAC respectfully submits that the judgment of the Third Circuit should be reversed with instructions that the portion of the order of the District Court holding the associations and contractors herein liable should be vacated.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
THOMAS R. BAGBY
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for the Amicus Curiae, Equal Employment Advisory Council

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Amicus Brief

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Nos. 81-280, 81-330, 81-331, 81-332, 81-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BECHTEL POWER CORPORATION,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *AMICUS CURIAE*

THOMAS I. ATKINS
General Counsel

MICHAEL H. SUSSMAN
Assistant General Counsel
NAACP Special Contribution Fund
1790 Broadway—Tenth Floor
New York, New York 10019
(212) 245-2100

Attorneys for Amicus Curiae

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *AMICUS CURIAE*

Interest of the Amicus

The NAACP, the nation's largest and oldest civil rights organization, directly represents the interest of hundreds of thousands black-American members. The Association was formed to advocate for the political, social, legal and economic rights of black Americans.

The NAACP has been counsel for plaintiffs in numerous employment discrimination matters and has a serious, ongoing and substantial interest in the enforcement of Title VII, 42 U.S.C. 1981 and other statutory and constitutional provisions meant to afford equal protection against all forms of employment discrimination.

The NAACP is particularly wary of legal arguments which substitute form for substance and through which employers seek immunity from discriminatory employment practices carried out for their monetary benefit and by their concerts.

Moreover, the NAACP believes it critical not to confuse the liability of employers for failure to ensure that non-delegable duties are lawfully executed with that of persons lawfully engaging in political speech. The court below did not find that the employers had criminally or civilly conspired but rather that as a class, those relying upon the hiring hall must be held liable for the union's discriminatory hiring practices.

We believe that affirmance by this court is necessary to vindicate and forward the purposes of our protections against employment discrimination.

Consent of the Parties

Counsel for all parties have been contacted by counsel for amici and have indicated they would consent to the grant of this Brief. Written consents will be filed with the Clerk as soon as possible.

Statement of Interest

The National Association for the Advancement of Colored People is the largest and oldest civil rights organization in the United States, representing the interests of hundreds of thousands of members. This case raises the critical question of whether, by delegating important employment decisions, employers may avoid liability for employment discrimination cognizable under 42 U.S.C. sec. 1981. Black-Americans, represented as they have been on

many occasions by the NAACP, have a deep and objective interest in this question as its resolution will foreseeably affect the possibility of strong enforcement of important anti-discrimination laws.

Statement of the Case

We adopt the statement of the case presented by respondent Williams, et al.

Summary of Argument

Assuming the propriety of a defendant class action in these circumstances, the adequacy of the factual bases in support of the findings below against the Local 542, of the International Union of Operating Engineers,* and the actual reliance of the defendant class members upon the hiring hall as the sole source of new hires, we urge this Court to affirm the liability of petitioners on the theory of "vicarious" or strict liability. The alternative neither would serve the purposes of section 1981 nor make for manageable litigation practices in the federal courts.

This Court should recognize the proper role of the defendant class device—to resolve common questions which relate to the liability of each defendant class member for use of and reliance upon a discriminatory hiring hall mechanism and foreclose unmanageable re-litigation by each of more than 1400 defendant class members of the role of the hiring hall. Such affirmance will trigger the commencement of Stage II proceedings below, at which time the district court shall scrutinize the exact racial composition of each individual defendant class member's work force at

* No petitioner seeks review of the underlying findings of intentional discrimination on the part of the union and the hiring hall.

the time the Complaint was filed in 1971 and determine responsibility for back pay awards.* *Myers* v. *Gilman Paper Co.*, 544 F.2d 837 (5th Cir. 1977), *cert. denied*, 434 U.S. 801 (1977).

ARGUMENT

A. *Emloyers Have a Non-Delegable Duty to Comply With the Requirements of 42 U.S.C. 1981 in Regard to Traditional Management Functions*

Hiring employees is traditionally a management function. *A fortiori*, ensuring that conduct violative of civil rights laws does not occur in the hiring process is and has always been considered a management responsibility. *Carey* v. *Greyhound Bus Co.*, 500 F.2d 1372 (5th Cir. 1974). While unions have been held liable and forced to contribute to remedies for their collusion in hiring discrimination, *Sager* v. *Yellow Freight System, Inc.*, 529 F.2d 271 (5th Cir. 1976), generally such findings have not relieved employers of liability for their role in designing and maintaining discriminatory hiring practices. In this matter, form has not been favored over substance. Accordingly, whether an employer itself hires or relies upon agents, foremen or hiring halls, its obligation—to employ in a non-discriminatory manner—persists. *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.) *cert. denied*, 404 U.S. 1006 (1971).

As respondents herein have demonstrated, the non-delegability of this critical management prerogative is analo-

* As the district court stated: "This decision is not designed to carry with it a presumption of backpay liability against the employers, for questions concerning possible allocation between the intentionally discriminatory union on the one hand and the employers and associations vicariously liable on the other must, by analogy to Title VII . . ., await consideration of the trial court at Stage II . . ."

gous to the responsibilities many civil rights laws impose upon principals, regardless of the business forms they choose to use in executing their affairs. And the law must be this way if the imperative of compliance is to remain valued, and substantive principles not subjected to disregard and neglect from preconceived manipulations and shenanigans, designed and implemented by entities seeking leave from their content.*

The affirmative duty of employers to ensure that their practices stand not as an affront to civil rights requirements is a logical extension of the non-delegability principle. What sense would it make to consider the duty of non-discrimination non-delegable, yet at once allow those charged ultimately with its effectuation to turn their backs upon it should they, for reasons of economy and business strategy, delegate the hiring function.**

No party to this matter has challenged the traditional function of the hiring hall as approved in *Local 57, International Brotherhood of Teamsters* v. *NLRB*, 365 U.S. 663 (1961): to hire and to refer qualified operating engineers to contractors and employers. Rather, this dispute centers on whether having delegated the selection function (though not its ultimate control), *cf. McFadden* v. *Baltimore Steamship Trade Association*, 8 F.E.P. case 391-393 (D.C. Md.

---

* In its Brief in the Third Circuit Court of Appeals, Bechtel Co. has urged against a holding of "contractors" liable because of the potentially massive sums which may be awarded in back pay to discriminatees. However, this argument should be turned on its head so to see the massive responsibility the employers seek to avoid by shielding their conduct through the hiring hall.

** Nor should it matter that the union's discriminatory conduct violated a neutral collective bargaining agreement. Employers must supervise implementation of key provisions of such agreements precisely because in practice they easily can be and have been manipulated to the detriment of minority applicants.

1972), employers may ignore the manner by which unions execute contractual agreements, *Morrison-Knudsen Co.* v. *NLRB*, 275 F.2d 914 (2d Cir. 1960),* or, in the district court's expression, "effect a withdrawal from reality."

This Court should reject petitioners' inaccurate and tautological argument that since the district court failed to find that the defendant class had control of the discrimination hiring hall, defendant class members cannot be held liable for a violation of 42 U.S.C. sec. 1981. First, petitioners do not explain why the district court erred in finding that employers could have exercised control over the discriminatory union practices in hiring. Unless challenged successfully as clearly erroneous, this finding of fact forecloses the petitioners from premising their arguments on an alleged inability to control hiring practices. Secondly, and more critically, in holding defendant class members liable, the district court found that no barrier prevented class members from knowing of the pattern of hiring and referral discrimination which pervaded their industry, and then using the contract's own terms to require the hiring hall to make appropriate changes in its practice. Indeed, the district court found, "The employers, particularly through their associations, had the potential capacity to be generally conscious of possible discrimination in the hiring hall and to seek to correct it by enforcing the provisions governing the hiring hall or at least after

* "Regardless of the extent of their (employers') knowledge we agree . . . that an employer may not avoid liability for violations of the Act by the hiring hall when he has turned over to it the task of supplying the men to be employed. The local acted as agent for the petitioners in selecting the men to be hired. Its discriminatory acts, which unlawfully encouraged membership in Local 545, are properly chargeable to the agent's principal discriminatory acts by it." (*id.* at 917).

1971 by enforcing the non-discrimination provisions of the contract." *

By enforcing the non-delegable duty upon the defendant class, this Court will encourage its members who *can* discover evidence of discriminatory employment and referral patterns upon inspection or inquiry, as in this case, to take such appropriate and responsible steps. Indeed, should this court affirm, there would be no doubt that employers cannot negotiate away their ultimate responsibility for ensuring that, however they hire employees, their methods will be non-discriminatory. Should unions seek to deprive employers of information necessary to make factual determinations as to compliance with non-discrimination standards, employers should use contractual and legal remedies to force the divulgence of such data.

Imposing affirmative duty upon employers in situations like the instant one would be unfair only (1) if they could not, in some real way, determine the racial composition of their own work forces, a starting point in any inquiry concerning discrimination in hiring, and (2) control the hiring process. Of course, neither of these conditions obtains here.

By holding employers to a standard of strict liability, this court will strongly encourage them to take care that section 1981 is followed. And since "It is the reasonably certain prospect of a backpay award that 'provides the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, as far as possible, the last

* This is not a case in which requiring employers to supervise a hiring hall will impinge upon traditional union prerogatives and sovereignty. *Cf. Lummus Co.* v. *NLRB*, 339 F.2d 728, 735 (D.D.C. 1964).

vestiges of an unfavorable and ignominious page in this country's history'.", *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975), *cited in Myers* v. *Gilman Paper Co., supra*, at 851. *Also see, Owen* v. *City of Independence*, 100 S.Ct. 1398 (1980), enforcing an affirmative duty to inquire about and cure hiring discrimination is reasonable and necessary, particularly in light of the construction industry's shameful history of discrimination. *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 198 n.1 (1979).

The briefs filed by petitioners present no barrier to the exercise by employers of appropriate supervisory responsibilities in seeing to it that all laws, including section 1981, are followed. Nor does the record indicate that putting teeth into the notion of non-delegability will put any employer to a hardship substantial enough to justify a contrary result. Finally, the efficacious enforcement of civil rights laws requires that all parties to an employment relationship and collective bargaining agreement, particularly those benefiting economically, have legal responsibility for ensuring that non-discrimination is actually adhered to in its operation.

B. *Having Properly Attributed the Discriminatory Conduct of the Union and the Hiring Hall to the Defendant Class, the District Court Properly Held All Class Members Liable for Intentional Discrimination Under Section 1981*

The petitioners' attempt to delegate responsibility for the operation of the hiring hall should be rejected. Indeed, because of the non-delegability of their responsibility and their failure to do anything whatsoever to ensure compliance with civil rights laws, the actions of the hiring hall and the local should be legally attributed to them, as a class. The district court found that, in numerous respects, Local 542 intentionally discriminated against black applicants for the position of operating engineers and other-

wise ran its program to exclude blacks from associated employment and apprenticeship opportunities. The Union acted on behalf of and in the interests of defendant class members and the district court correctly attributed its intentional discrimination to principals who voluntarily renounced their own authority to hire in favor of a joint hiring hall system.

Proof of intentional racial discrimination against the agent union, as the district court found in this matter, makes irrelevant proof *by* any individual employer that its workforce is representative of the labor force. Each employer excluded numerous black applicants by reliance upon a discriminating hiring hall which intentionally refused employ to black applicants on the basis of race. In *Furnco Construction Co.* v. *Waters,* 428 U.S. 567, 579 (1978), this Court stated, "A racially-balanced work force cannot immunize an employer liability for specific acts of discrimination." If the contrary obtained, a prospective employee, illegally denied the right to a job on account of his race and *not* relying upon a statistical showing to establish a *prima facie* case of disparate impact, could not recover for racial discrimination from an employer having a well-balanced labor force. This result is inconsistent with the right of each person not to be discriminated against and, having demonstrated discrimination, to obtain appropriate relief.

In short, having agreed contractually to rely upon the hiring hall, employers and associations of employers should be held liable for the intentionally discriminatory conduct of those daily operating the hiring hall on their behalf.

C. *A Decision Contrary to the One Reached Below Will Insulate Employers From Responsibility for Their Acts and Encourage Employment Discriminaion*

Employers use hiring halls for economic and efficiency reasons. The decision to do so should be made in full recognition that the employer retains ultimate control over hiring and firing decisions and will be held legally accountable for the discriminatory conduct of hiring hall agents. If an employer cannot be liable for employment discrimination committed by a hiring hall he relies upon, there is an incentive for him to use the latter system not merely to forward a possibly discriminatory intent, but simply to minimize the risk of liability for discriminatory conduct. Moreover, if liability rests on actual knowledge, rather than strict liability derivative from the nature of the relationship and function themselves, an employer will have motive to remain as ignorant as possible about the operation of the hiring hall. Setting up such negative incentives would be directly contrary to the meaning and spirit of section 1981 which expands the rights of black-Americans to the full extent enjoyed by white-Americans.

Petitioners suggest that affirmance would destroy the tenability of hiring halls. This conclusion depends on the assumption that by playing a more aggressive supervisory role and ensuring the absence of discrimination in hiring and referrals, employers or their associations somehow would threaten the raison d'etre of the hiring hall system. The reasoning behind this conclusion is not provided, but suggests illicit purposes for the hiring halls, themselves. If requiring employers to supervise the hiring hall operation will make the form untenable, then so be it. No argument for reversal can posit as a harm to be avoided the more aggressive enforcement of our civil rights laws.

CONCLUSION

WHEREFORE, for all of the reasons set forth above, *amicus curiae* respectfully urges that the Court affirm the decision of the Court of Appeals for the Third Circuit.

Respectfully submitted,

THOMAS I. ATKINS
General Counsel

MICHAEL H. SUSSMAN
Assistant General Counsel
NAACP Special Contribution Fund
1790 Broadway—Tenth Floor
New York, New York 10019
(212) 245-2100

Attorneys for Amicus Curiae

Certificate of Service

I hereby certify that three copies of the foregoing Brief for National Association for the Advancement of Colored People, *Amicus Curiae,* were mailed, postage prepaid, this 4th Day of January, 1982 to:

ROBERT W. KOPP
DAVID M. PELLOW
Bond, Schoeneck & King
One Lincoln Center
Syracuse, New York 13202

Attorneys for Petitioner, Bechtel Power Corporation

BERNARD G. SEGAL
MARTIN WALD
NICHOLAS N. PRICE
Schnader, Harrison, Segal & Lewis
1719 Packard Building
Philadelphia, Pennsylvania 19102

Attorneys for Petitioner, United Engineers & Constructors, Inc.

LEROY S. ZIMMERMAN
Attorney General
MARGARET HUNTING
JOEL M. RESSLER
Deputys Attorney General
Office of the Attorney General
Strawberry Square, 16th Floor
Harrisburg, Pennsylvania 17120

Attorneys for Respondent, Commonwealth of Pennsylvania

HAROLD I. GOODMAN
GERMAINE INGRAM
Community Legal Service, Inc.
Sylvania House
Juniper and Locust Streets
Philadelphia, Pennsylvania 19107

Attorneys for Individually Named and Class Respondents

JOHN G. KESTER
JOHN J. BUCKLEY, JR.
WILLIAMS & CONNOLLY
1000 Hill Building
839 17th Street N.W.
Washington, D.C. 20006

Attorneys for Petitioner, General Building Contractors, Inc.

JOHN J. MCALEESE, JR.
CUNNIFF, BRAY & MCALEESE
240 One Bala Cynwyd Plaza
Bala Cynwyd, Pa. 19004

Attorneys for Petitioners Glasgow & United

MICHAEL H. SUSSMAN

Amicus Brief

5

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OCTOBER TERM, 1981

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC., *et al.*,
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v.
COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*, THE WASHINGTON LEGAL FOUNDATION

DANIEL J. POPEO
PAUL D. KAMENAR
NICHOLAS E. CALIO
1612 K Street, N.W.
Suite 502
Washington, D.C. 20006
(202) 857-0240
Attorneys for Amicus Curiae
Washington Legal Foundation

December 3, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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OCTOBER TERM, 1981

No. 81-280; 330-33

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COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Washington Legal Foundation, Inc. hereby moves, pursuant to Supreme Court Rule 42, for leave to file the annexed brief *amicus curiae* in support of the position of the petitioners in the above-captioned proceeding. Consent to the filing of this brief has been obtained by counsel for petitioner General Building Contractors Association, Inc., the Commonwealth of Pennsylvania, and the individual and class respondents. The remaining parties have been contacted and no opposition or consent have yet been received.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and

supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared in this Court on many occasions as *amicus curiae*, including *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Carbon Fuel Co. v. United Mine Workers*, 442 U.S. 939 (1979); and *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979).

The Washington Legal Foundation can bring to this case a broader perspective not presently represented which may assist this court in obtaining full consideration of all the public interest issues involved. Accordingly, the Washington Legal Foundation requests that it be permitted to participate as *amicus curiae* in this matter.

Respectfully submitted,

DANIEL J. POPEO
PAUL D. KAMENAR
NICHOLAS E. CALIO
WASHINGTON LEGAL FOUNDATION
1612 K Street, N.W.
Suite 502
Washington, D.C. 20006
(202) 857-0240

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-280; 330-33

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC., *et al.*,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF *AMICUS CURIAE*, WASHINGTON LEGAL FOUNDATION, INC.

The Washington Legal Foundation, Inc. is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared

in this Court on many occasions as *amicus curiae*, including *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Carbon Fuel Co. v. United Mine Workers*, 442 U.S. 939 (1979); and *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979).

The Washington Legal Foundation can bring to this case a broader perspective not presently represented which may assist this court in obtaining full consideration of all the public interest issues involved.

STATEMENT OF THE CASE

In 1961, Local 542 signed a collective bargaining agreement with petitioner trade associations who represented numerous contractor employers. One divisive issue during the preceding negotiations had been the union's demand for an exclusive hiring hall provision. The trade associations had persistently rejected such a provision, but:

> given the reality of a 10 week strike by the 542 members and the prospect of serious adverse economic consequences from a continued strike, the CAEP and GBCA agreed to the Unions' proposal.

Pennsylvania v. Local Union 542, 469 F. Supp. 329, 339 (E.D. Pa. 1978).

The hiring hall provision is facially neutral and, in fact, contains a non-discrimination clause. The union, nonetheless, was found to have discriminated against minority workers in operating this hiring referral system.

The minorities brought this class action suit alleging violations of Title VII, 42 U.S.C. § 1981, and other statutes against the union and petitioners. The trial court found intentional discrimination on the part of the union in violation of Title VII and § 1981. 469 F. Supp at 394-400.

As to the contractors and trade associations, however, the court found neither intent to discriminate nor knowledge or reason to know of the union's discrimination. 469 F. Supp. at 401. Nevertheless, the court held petitioners:

> injunctively liable to the plaintiff class under § 1981 as a result of their contractual relationship to and use of a hiring hall system which in practice effectuated intentional discrimination, whether or not the employers and associations knew or should have known.

469 F. Supp. at 401.

On appeal to the Third Circuit, an equally divided court affirmed the legal question of whether the petitioners herein could be held liable under § 1981 absent discriminatory intent. The union did not appeal the trial court's ruling.

SUMMARY OF THE ARGUMENT

The court below seriously erred by ruling that petitioners are vicariously liable for violating 42 U.S.C. § 1981 even though there was no finding by the court that there was any intent on their part to discriminate against minorities. The novel decision below does violence to the history of § 1981 as well as judicial decisions in this area. *Amicus* submits the decision is contrary to the public interest and should be reversed.

ARGUMENT

I. THE REQUIREMENT OF DISCRIMINATORY INTENT FOR § 1981 CLAIMS IS MANIFESTED BY STATUTORY HISTORY AND RELATED JUDICIAL DECISIONS.

The district court erroneously applied a "disproportionate impact" standard in assessing whether petitioners violated 42 U.S.C. § 1981. The court found that petitioners neither intended to discriminate, nor knew or had reason to know of the union's discriminatory acts. Yet, the court held that, because the union's unlawful acts were pursuant to a neutral hiring hall provision of a collective bargaining agreement, petitioners were liable under § 1981 for being parties to that contract which ultimately produced a disproportionate impact on minority workers. A disproportionate impact standard, however, is inappropriately applied to § 1981 claims. The legislative history of that statute as well as this Court's decisions in the employment discrimination area make it clear that proof of discriminatory intent is required for a claimant to succeed under § 1981.

42 U.S.C. § 1981 declares that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

While this language does not unambiguously point to a particular standard, the equal right to make a contract would seem merely to prohibit conduct denying that right. Conversely, courts have wondered "how the concept of disproportionate impact would give dimension to the notion of equality in regard to such rights as the right to sue, the right to be a party to a legal proceed-

ing, or the right to give evidence." *Guardians Ass'n. of New York City v. Civil Service Comm'n.*, 633 F.2d 232, 266 (2d Cir. 1981).

Moreover, in construing the purpose of § 1981, it is apparent that the evil which the 29th Congress sought to remedy was invidious, discriminatory conduct by whites during the Post-Civil War Reconstruction Era.

> The [Reconstruction] Acts were meant to deal with the most egregious forms of reactionary white conduct; they were not intended to fashion an evidentiary presumption designed to root out more subtle forms of discrimination. . . . [I]t cannot seriously be argued that the legislative history . . . supports the contention that Congress meant these laws to outlaw any conduct with unintended racially disproportionate effects upon contracts. A reading of the relevant Congressional debates reveals absolutely nothing that would lend credence to such a notion. On the contrary, these sources give every indication that these laws were intended only to outlaw those actions with invidious discriminatory motivation.

Note, *Racially Disproportionate Impact: §§ 1981 and 1982*, 1977 DUKE L.J. 1267, 1279-80 (1977).

Proponents of a discriminatory impact standard have argued that since § 1981 was enacted pursuant to the 13th amendment, which was designed to eliminate the badges and incidents of slavery, an impact standard would be proper. *See Civil Rights Cases*, 109 U.S. 3, 20 (1883). *Amicus* regards this argument as superficial and without merit.

A more persuasive construction is found in the Third Circuit's recent opinion in *Croker v. Boeing Co.*, Nos. 1569/70, (3d Cir., September 30, 1981):

> We believe it is clear that the 1866 Act [from which § 1981 originated] was a response to burgeoning abuses against former slaves, which threatened to

> render illusory the freedom granted to them in the 13th amendment. . . . This threat came from the growing power of the Ku Klux Klan and the adoption by the Southern States of the "Black Codes" which restricted [various] rights. . . . Thus the legislative history of the 1866 Act generally reveals a Congressional concern with "direct intentional abuses."

Id. at 19.

Moreover, it is noteworthy that § 1981 was reenacted in Section 16 of the Civil Rights Act of 1870—*after* the adoption of the 14th amendment. This court has held that discrimination claims under the 14th amendment require proof of discriminatory intent. *Washington v. Davis*, 426 U.S. 229 (1976). Although this court has construed § 1981 to be a 13th amendment provision (*Runyon v. McCrary*, 427 U.S. 160 (1976)), it is likely that § 1981 rests of both amendments.

II. AN INTENT STANDARD IS CONSISTENT WITH RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS.

Victims of discrimination may vindicate their rights under the Equal Protection Clause of the 14th and 5th amendments, Sections 1981, 1982, and 1983 of the Civil Rights Act of 1866, and Title VII of the Civil Rights Act of 1964. Proof of discriminatory intent is required by the Equal Protection Clause, *Washington v. Davis*, 426 U.S. 229 (1976) and by § 1983, *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979). Only Title VII has been held by this Court to allow merely a showing of disproportionate impact. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Amicus* submits that the more reasonable standard to be applied is the intent standard of the Equal Protection Clause. This is so because of the similiarities between the 14th amendment and § 1981, the differences between Title VII and § 1981, and the undesirable public policy implications that would result from adopting an impact standard.

A. Section 1981 Is More Similar To The 14th Amendment Than To Title VII And Should Therefore Require An Intent Standard.

Section 1981 parallels the Equal Protection Clause in several respects. First, there is a similarity in language. Both provide for the equal benefit or protection of the laws. Second, both provisions cover a significantly broad scope of discriminatory acts—neither is limited to employment discrimination, as is the case with Title VII. "In fact, where a contractual relationship exists, § 1981 has the effect of an Equal Protection Clause without a state action requirement," Note, 9 U. GOLDEN GATE L.REV. 1, 19 (1977-78). Finally, § 1981 was reenacted in § 16 of the Civil Rights Act of 1870 *after* the adoption of the 14th amendment. The holding in *Runyon v. McCrary*, 427 U.S. 160 (1976) that § 1981 was enacted pursuant to the 13th amendment "does not logically preclude a finding that [§ 1981 is] closely related to the 14th amendment; likewise, it does not compel a conclusion that the standards for interpretation of [this statute] must be different than the standards of the 14th amendment." Note, *Racially Disproportionate Impact: Sections 1981 and 1982*, 1977 DUKE L.J. 1267, 1282.

The District Court in the instant case, however, applied Title VII standards to § 1981. Yet the differences between Title VII and § 1981 are more compelling than their similarities. First, the statutes have no historical connection. Second, § 1981 reaches only racial discrimination—Title VII covers gender-based discrimination as well as other forms of discrimination.

Most importantly, § 1981 is not limited in scope as is Title VII which is limited to employment discrimination. Furthermore, a carefully constructed administrative path is available to a Title VII claimant. For example, a Title VII complaint must be filed with the Equal Employment Opportunity Commission (EEOC) within 180 days after the alleged discriminatory act. EEOC then has 180 days within which to issue a right to sue letter.

Suit must be filed within 90 days after receipt of the letter or is time-barred. Moreover, the remedy in a Title VII action is limited to back-pay accruing two years before the complaint is filed.

In contrast, a § 1981 plaintiff confronts no administrative procedures before filing a complaint; the statute of limitations for a § 1981 claim is that of the most closely analogous state statute; and the relief available under § 1981 includes a variety of equitable remedies.

B. A Disproportionate Impact Standard For § 1981 Would Render The Equal Protection Clause And Title VII Virtually Superfluous.

If a disproportionate impact statement is adopted for § 1981 claims, both the Equal Protection Clause and Title VII remedies will become virtually superfluous.

In *Washington v. Davis*, 426 U.S. 229 (1976), this Court was concerned that a disproportionate impact standard:

> might invalidate a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be burdensome to the poor and to the average black than to the more affluent white.

426 U.S. at 248.

These policy considerations are even more compelling in considering the proper standard for § 1981, since § 1981 includes 14th amendment coverage where race is concerned and also embraces private, as well as state action. Thus, the strategic plaintiff will simply avoid the more rigorous intent standard required by the Constitution, and base his or her claim upon § 1981.

Similarly, Title VII will become emasculated to the extent it covers racial discrimination. Again, the strategic claimant can circumvent the EEOC procedures, and get a greater recovery than Title VII permits, by filing a § 1981 claim instead.

These policy implications mandate a reversal of the opinion below in favor of a discriminatory intent stand-

ard for § 1981 claims. Indeed, it is interesting to note that the authority upon which the District Court based its decision has since collapsed. The Third Circuit last month adopted an intent standard for § 1981 claims (*Croker v. Boeing Co.*, Nos. 1569/70, 3d Cir., September 30, 1981). And the principal case upon which the district court based its reasoning, *Davis v. Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979), has since been overruled by the Ninth Circuit in *Craig v. County of Los Angeles*, 626 F.2d 659 (9th Cir. 1980), *cert. denied*, 101 S.Ct. 1364 (1981).

As properly stated by the court in *Craig*:

> the historical connection between § 1981 and the 14th amendment, the thrust of the Supreme Court decision in *Washington v. Davis*, *supra*, the complexity as well as the legislative history and statutory scheme adopted by Congress in Title VII, and the ease with which acceptance of plaintiffs' theory would allow circumvention of that scheme convince us that equal protection rather than Title VII standards apply to employment discrimination claims brought under § 1981.

626 F.2d 659, 688.

III. THE DISTRICT COURT ERRONEOUSLY HELD PETITIONERS VICARIOUSLY LIABLE FOR THE DISCRIMINATION BY THE UNION.

The District Court also premised its holding on a vicarious liability theory. The Court reasoned that the hiring hall arrangement rendered the Union an "agent" for employers with respect to job referrals, and thus, the employers as "principals" were liable for the union's unlawful acts. The lower court imposed a novel duty on the employers "to see that no discrimination takes place outside the agreement." 469 F. Supp. 329, 409.

Amicus submits that the *sine qua non* of vicarious liability—substantial control by the principal over the agent—is lacking in the present case. And, more im-

portantly, the imposition of an affirmative duty on the employers to be a watchdog over union practices contravenes labor relations policy and generates industrial strife.

A. The Doctrine Of Respondeat Superior Is Inapplicable To A Hiring Hall System In Which Employers Had No Control Or Knowledge Of The Union's Unlawful Acts.

A key element of respondeat superior is control—the principal must have control over the agent's acts to be vicariously liable for them. In the field of labor relations, the proposition that an employer and union have an agency relationship is a novel one.

> The basic thesis for the whole of modern thought in this area is that the representative of the employees is not, cannot be, and must not be under the complete control of the employer. Therefore, in this area the relationship of principal and agent, in so far as it carries with it the concept of principal control over the agent and its consequent doctrine of *respondeat superior*, must be carefully delineated and applied with perceptive selectivity.

Lummus Co. v. NLRB, 339 F.2d 728, 735 (D.C. Cir. 1964).

In the instant case, employer control over the union's operation of the hiring hall was conspicuously absent. It is simply not feasible to conclude that each of the 1400 employers who used the union's referral system could be said to control the union's implementation of that system.

The major authority cited by the District Court for imposing vicarious liability, *Morrison-Knudson Co. v. NLRB*, 336 U.S. 909 (1961), is readily distinguishable. In that case, the employer *had knowledge* of the union's discriminatory acts. Indeed, later courts have interpreted the holding in *Morrison-Knudson* to turn on employer knowledge. *See NLRB v. Master-Stevedores of Texas*,

418 F.2d 140, 145 (5th Cir. 1969); *Lummus Co. v. NLRB*, 339 F.2d 728, 738 (D.C. Cir. 1964). In the case at bar, however, the employers did not have such knowledge.

B. The Imposition Of An Affirmative Duty On Employers To Ensure That No Discrimination Occurs Generates Industrial Strife And Is Not In The Public Interest.

The District Court imposed upon petitioners a duty to ensure that no discrimination takes place outside the hiring hall agreement. *Amicus* submits that such a duty would seriously disrupt the collective bargaining process and would produce industrial strife, in contravention to labor relations policy.

On the one hand, if the employer does consistently monitor the hiring hall, he may find himself confronted with the Scylla of several unfair labor practice charges: for interfering or restraining employees in the exercise of their Section 7 rights (NLRA § 8(a)(1)); and interfering with the administration of the Union (NLRA § 8(a)(2)). If the employer therefore independently decides to hire minorities, he will be charged with breach of the exclusive hiring hall provision. On the other hand, if the employer does not police the union's hiring hall activities, he risks the Charibdys of being held vicariously liable for the Union's discrimination.

To avoid this dilemma, employers will probably resist hiring halls altogether. And the union will probably strike, as did the Union in the instant case in 1961. Since the construction industry is dominated by union workers, severe work stoppages would likely ensue, people will be out of work, and the economy will suffer.

Labor relations policy seeks to reduce work stoppages and industrial strife through the collective bargaining process whereby employers and unions can accommodate their competing interests, *See, e.g., Boys Markets Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

If the District Court's order prevails, there will be no such accommodation.

This Court has recognized the utility of hiring halls. In *Local 357, Teamsters v. NLRB*, 365 U.S. 667, 672 (1961) the Court stated:

> the contractor who frequently is a stranger to the area where the work is done requires a "central source" for his employment needs; a man looking for a job finds in the hiring hall "at least a minimum guarantee of continued employment."

An affirmative duty to see that no discrimination takes place outside the hiring hall agreement is likely to destroy the use of hiring halls altogether, to the detriment of management and labor alike.

CONCLUSION

For the foregoing reasons, *amicus* submits that the decision below is contrary to law and public policy and should accordingly be reversed.

Respectfully submittted,

DANIEL J. POPEO
General Counsel

PAUL D. KAMENAR
Director of Litigation

NICHOLAS E. CALIO
Litigation Counsel
WASHINGTON LEGAL FOUNDATION *
1612 K Street, N.W., Suite 502
Washington, D.C. 20006
202-857-0240

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